IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

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SUPREME COURT, U.S.

NO. 79-5962

DANNY VINCENT,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas Court of Criminal Appeals

JURISDICTIONAL STATEMENT

Of Counsel:

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON

Robert D. Lemon
Robert D. McCutcheon
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P.O. Box 1066
Perryton, Texas 79070

ATTORNEYS FOR APPELLANT

January, 1980

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IN THE

SUPREME COURT of the UNITED STATES

October Term, 1979

NO.

DANNY VINCENT,

Appellant,

V.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas Court of Criminal Appeals

JURISDICTIONAL STATEMENT

THE OPINION BELOW

The per curiam decision of the Texas Court of Criminal Appeals is unpublished, 586 S.W.2d 880, (Tex. Crim. App. 1979), and appears herein as Appendix A. No other written opinions have been delivered.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) Appellant Danny Vincent ("Vincent") appeals from a revocation of probation. Vincent was convicted of burglary in the 84th District Court of Ochiltree County, Texas. The court fined Vincent $2,000.00 and placed him on probation for six years. Vincent was later arrested on a complaint of driving while intoxicated, driving without a driver's license, driving with no tail lights and making excessive noise. After spending over a month and a half in jail and without a preliminary hearing, on April 10, 1978, the court revoked appellant's probation.

Article 42.12(8) of the Texas Code of Criminal Procedure ("The Statute") (please see Appendix B) does not require the State to conduct some minimal inquiry after Vincent's alleged probation violation or arrest in the nature of a preliminary hearing to determine whether there was probable cause to believe that Vincent had committed acts that violated probation conditions. It is undisputed that no such preliminary hearing was held. Appellant objected to the revocation on two grounds:

> (a) The Statute is unconstitutional on its face for failure to provide for the preliminary hearing and attendant safeguards required by the due process clause of the Fourteenth Amendment to the United States Constitution as enunciated in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973); and,
>
> (b) Vincent, in this case, was denied due process of law mandated by Morrissey and Scarpelli, where Vincent's probation was revoked without a preliminary hearing and attendant safeguards required by the due process clause of the Fourteenth Amendment to the United States Constitution as enunciated in Morrissey v. Brewer, 408 U.S. 471 (1972) and Gagnon v. Scarpelli, 411 U.S. 778 (1973).

The decision of the Texas Court of Criminal Appeals upheld the revocation and The Statute. Vincent appeals pursuant to 28 U.S.C. § 1257(2).

(ii) Vincent seeks review of the September 19, 1979 decision of the Texas Court of Criminal Appeals affirming the judgment of revocation of probation. Vincent timely filed a Motion for Rehearing en banc on September 26, 1979. Vincent's Motion for Rehearing was denied October 10, 1979. See Appendix C. The Notice of Appeal was filed in the court possessed of the original record, the 84th District Court of Ochiltree County, and in the Texas Court of Criminal Appeals. See Appendix D.

(iii) 28 U.S.C. § 1257(2) (1966) confers jurisdiction of the appeal on this Court.

(iv) Cases sustaining the jurisdiction of this Court are:

Duncan v. Louisiana, 391 U.S. 145 (1968);

Giaccio v. Pennsylvania, 382 U.S. 399 (1966);

Hoyt v. Florida, 368 U.S. 57 (1961);

Ferguson v. Georgia, 365 U.S. 570 (1961);

Gagnon v. Scarpelli, 411 U.S. 778 (1973);

Morrissey v. Brewer, 408 U.S. 471 (1972).

(v) This appeal questions the validity of Article 42.12(8), Texas Code of Criminal Procedure. Since the statutory provision 42.12(8) is lengthy, the citation is Tex. Code Crim. Proc. Ann. Art. 42.12(8) (Vernon 1979). The pertinent text of Article 42.12(8) is recited at Appendix B.

QUESTIONS PRESENTED BY THE APPEAL

(i) Whether The Statute, which does not require the State to hold any preliminary hearing to determine probable cause to believe the probationer has violated probation conditions, is unconstitutional on its face as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

(ii) Whether The Statute, which does not require the State to hold any preliminary hearing to determine probable cause to believe the probationer has violated probation conditions is constitutional as applied to in case as violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE FACTS OF THE CASE

On May 23, 1977, Vincent pled guilty to burglary. The trial court fined Vincent $2,000.00 and sentenced him to six years in the Texas Department of Corrections. The court suspended the imposition of the prison sentence and attached as conditions of his probation that he commit no offense against the laws of Texas and refrain from drinking intoxicants.

On February 6, 1978, Vincent was arrested upon the State's Supplementary Motion for Warrant to Revoke Probation, alleging, among others, that Vincent was driving while intoxicated, and had not refrained absolutely from drinking intoxicants.

On February 6, 1978, the court set the date for the show cause hearing on the State's supplementary motion for March 27, 1978. Vincent did not receive notice of the hearing until March 2, 1978. On March 24, 1978, Robert McCutcheon was appointed counsel for Appellant upon Appellant's "Affidavit of Inability to Employ Counsel."

The Statute allows a defendant who has been arrested in respect of a probation revocation and who has not been released on bail to make a motion for a hearing on the merits to be held within twenty days of the filing of the motion to revoke. After the hearing on the merits, the court may decline to revoke, modify or revoke probation. The State undisputedly did not hold a hearing to determine probable cause. The Statute does not require it. Vincent was in jail for over a month and a half without knowing he had the statutory right to a hearing on the merits.

On March 27, 1978, three days after counsel was appointed for Vincent, Vincent filed his Motion to Quash and Special Exceptions directed to appellee's Original and Supplementary Motions to Revoke the Probation. At this time appellant challenged The Statute on the following grounds:

(a) Citing Gagnon v. Scarpelli, 411 U.S. 778, (1973), and Vincent claimed the right to a preliminary hearing, as promptly as convenient after arrest, and notice thereof, to determine probable cause of the alleged violations of probation.

(b) Vincent asserted the revocation of probation under The Statute without a preliminary hearing was expressly prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.

(c) Vincent objected that The Statute was unconstitutional on its face, and as applied to him, for failure to provide for the preliminary hearing and attendant safeguards mandated by Morrissey v. Brewer, 408 U.S. 471 (1972), ("Morrissey") and Gagnon v. Scarpelli, 411 U.S. 778 (1973), ("Scarpelli") under the Fourteenth Amendment to the United States Constitution.

The trial court overruled Vincent's constitutional objections. On April 10, 1978, the Court found that Vincent violated his probation conditions by driving while intoxicated and drinking alcoholic beverages and revoked his probation. Vincent timely appealed to the Texas Court of Criminal Appeals to review the judgment below and specifically the court's ruling on 42.12(8)(a). On such appeal, Vincent raised the identical objections as set forth above.

On September 19, 1979, the Texas Court of Criminal Appeals affirmed the judgment of the lower court. The per curiam decision stated: "Both grounds complained of the failure of the Texas system of probation to provide a preliminary hearing of the kind discussed in Scarpelli. . . . This argument was rejected in Whisenant v. State, 557 S.W.2d 102, and it does not require further discussion today." The opinion, 586 S.W.2d 880, is unpublished and is attached to this statement as Appendix A. Vincent's Motion for Rehearing en banc was denied. See Appendix C.

THE FEDERAL QUESTION PRESENTED IS SUBSTANTIAL

The Texas Court of Criminal Appeals is of the opinion that the logic and holdings of the U.S. Supreme Court in Scarpelli and Morrissey do not apply to Texas probation revocation proceedings. Ex Parte Shivers, 501 S.W.2d 898, (Tex. Crim. App. 1973). Whisenant, supra. Thus, this appeal squarely raises the question of whether the State may revoke an arrested accused's probation without an informal preliminary hearing to determine probable cause, as required by this Court's interpretation of the due process clause in Scarpelli.

In analogous situations on claims of the denial of an opportunity to be heard, this Court has entertained such substantial federal questions. Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972). State statutes which violate express prohibitions of the constitution and which deny due process present substantial federal questions. Duncan v. Louisiana, 391 U.S. 145 (1968), rehearing denied, 392 U.S. 947.

The constitutional precedents established by this Court directly clash with the thrice-refusal of the Texas Court of Criminal Appeals to recognize the settled constitutional doctrine as announced in Scarpelli. Although a state is not constitutionally required to provide for probation and revocation proceedings as part of its criminal procedure, if a state chooses to implement such procedures, then the due process

clause is fully applicable to the state's decision. Douglas v. California, 372 U.S. 353. (1963).

Even though the revocation of probation is not a part of the criminal prosecution, the court has held that the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process. Gagnon v. Scarpelli, 411 U.S. at 781. Using this logic, Texas courts have granted probationers Fourth Amendment protections, Tamez v. State, 534 S.W.2d 686 (Tex. Crim. App.--1976) and Fifth Amendment protections, Dowdy v. State, 534 S.W.2d 336 (Tex. Crim. App.--1976). Despite the recognition that the Fourth and Fifth Amendments apply to the Texas probation revocation process, the Texas Court of Criminal Appeals has consistently refused to listen to and apply Scarpelli logic to the Texas probation system. Shivers and Whisenant, supra.

This Court has not perceived a difference between the revocation of probation and the revocation of parole. In its unanimous decision, this Court affirmed the importance of the applicability of due process to probation revocation:

> "Both the probationer or parolee and the state have an interest in the accurate finding of fact and the informed use of discretion--the probationer or parolee to insure that his liberty is not unjustifiably taken away; and, the state to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation, nor imprudently prejudicing the safety of the community." Gagnon v. Scarpelli, 411 U.S. 778 at 785.

This Court in Morrissey and Scarpelli established minimum due process safeguards whenever the state attempts to revoke parole or probation. Minimum due process includes: notice to the probationer of alleged violations of probation; opportunity for the probationer to present evidence in its own behalf; a conditional right of the probationer to confront adverse witnesses; an independent decision maker, and a written report of the hearing. Such requirements serve as a substantial protection against ill-considered revocation. None of these minimal safeguards were granted Vincent in this case.

The Statute ignores one of the two important stages in the typical process of probation revocation; i.e., the informal preliminary hearing to determine probable cause. Yet probationers, like parolees, are entitled to a preliminary and a final revocation hearing under the conditions specified in Morrissey. Gagnon v. Scarpelli, 411 U.S. 778 at 783.

Probation revocation, like parole revocation, is not a stage of the criminal prosecution, but does result in a loss of liberty. Gagnon v. Scarpelli, 411 U.S. 778 at 782. This Court in Scarpelli said at footnote 4: "it is clear at least after Morrissey v. Brewer, 408 U.S. 471 (1972), that a probationer can no longer be denied due process, in reliance on the dictum in Escoe vs. Zerbst, 295 U.S. 490 (1935), that probation is an 'act of grace'".

Nevertheless, Texas courts have consistently sought to avoid the unequivocal requirement of a preliminary hearing by

arguing that the Texas statute allows an accused probationer even more protection than the court in Scarpelli. See, Ex Parte Shivers, 501 S.W.2d 898 (Tex. Crim. App.--1973), and Whisenant v State, 557 S.W.2d 102, (Tex. Crim. App.--1977).

The requirement of an informal preliminary hearing which Scarpelli held that "probationers are entitled to" would impose no serious practical problems in probation revocation cases. This Court certainly did not intend to foreclose the states from holding both the preliminary and the final hearings at the place of violation, or from developing other creative solutions to the practical difficulties of the Morrissey requirements. Gagnon v. Scarpelli, 411 U.S. 778 at 783. Nevertheless, Texas has not even attempted to follow Scarpelli's mandate and to create a solution to the practical difficulties, if any, of the Morrissey requirements. Texas has thrice-ignored the mandate of Scarpelli. One Texas Procedure scholar has criticized Whisenant as "clearly erroneous." Hippard, Annual Survey of Texas Law, 33 Southwestern Law Journal 1, at 558 (1979).

One problem with The Statute is that, as in the present case, counsel may not be appointed for weeks after the detention of the accused. It is a rare probationer indeed who is aware of and is competent enough to handle his constitutional rights under the Texas probation statute. In the meantime, such accused probationer languishes in jail with no preliminary hearing to

determine whether probable cause exists to detain him for the alleged violation of his probation conditions.

This is a case of far-reaching effect and importance, as the Court will be able to, in the words of Mr. Chief Justice Burger in Morrissey, decide precisely "what process is due." Not only will resolution of these issues have an important effect on the administration of the probation system, but a decision will also allow the states more freedom in experimenting with appropriate probation procedures. These are issues, not frivolous, which require analysis and exposition for their resolution. Wright, Miller, Cooper and Gressman, Federal Practice and Procedure: Jurisdiction §4014, citing Milheim v. Moffat Tunnell Improvement Dist., 262 U.S. 710 (1923). A dismissal of this mandatory appeal will operate as a binding precedent on Texas and federal courts that no preliminary hearing to determine probable cause is necessary. Dismissals on the merits for lack of a substantial federal question are binding on the lower federal courts. Wright and Miller, Federal Practice and Procedure; Jurisdiction § 4014 at 638, citing Hicks v. Miranda, 442 U.S. 332 (1975).

CONCLUSION

This appeal raises issues of fundamental importance to American and Texas criminal procedure in light of the settled doctrines this Court applying due process protections to parole and probation revocation proceedings and of the increasing importance of probation in American and Texas criminal justice.

The questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution.

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

R. Lemon
Of Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing Jurisdictional Statement was hand delivered to William L. Rivers, Ochiltree County Attorney, and placed in the U.S. Mail, Certified, Return Receipt Requested, to the Honorable Mark White, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711.

Dated: January 7th, 1980.

Robert D. McCutcheon
Robert D. McCutcheon

APPENDIX A

OPINION OF THE
TEXAS COURT OF CRIMINAL APPEALS

OPINION

On May 23, 1977, the appellant pleaded guilty to burglary and was granted six years' probation. On April 10, 1978, his probation was revoked.

On appeal from the revocation of probation, the appellant sets forth two grounds of error. Both grounds complain of the "failure" of the Texas system of probation to provide a preliminary hearing of the kind discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973). This argument was rejected in Whisenant v. State, 557 S.W.2d 102 (Tex.Cr.App. 1977), and it does not require further discussion today.

The judgment is affirmed.

PER CURIAM OPINION
586 S.W.2d 880

DELIVERED: September 19, 1979

By: Panel No. 2, 1st Quarter, 1979

COMPOSED OF: Leon Douglas, Judge
Truman Roberts, Judge
Wendell Odom, Judge

APPENDIX B

PERTINENT PROVISION
OF THE
TEXAS CODE OF CRIMINAL PROCEDURE

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

APPENDIX C

NOTICE OF

REHEARING DENIAL

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas OCT 10 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Motion for Rehearing En Banc in Cause No. 60,564 Danny Vincent

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS OF TEXAS
P. O. Box 12308, Capitol Station
AUSTIN, TEXAS 78711

MR. ROBERT D. McCUTCHEON
ATTORNEY AT LAW
P. O. BOX 1066
PERRYTON, TEXAS 79070

APPENDIX D

IN THE DISTRICT COURT FOR THE 84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

DANNY VINCENT,	§	
	§	
Appellant,	§	
	§	
VS.	§	NO. 1494
	§	
STATE OF TEXAS,	§	
	§	
Appellee.	§	

NOTICE OF APPEAL

Appellant DANNY VINCENT gives notice of his intent to appeal from the affirmation of his probation revocation in No. 60,564 of the Texas Court of Criminal Appeals and shall take appeal to the United States Supreme Court pursuant to 28 U.S.C. § 1257(2). Appellant appeals from final judgment entered and delivered on September 19, 1979 in No. 60,564 and from denial of Appellant's Motion for Rehearing En Banc entered on October 10, 1979. Although the original record is maintained in the above-designated court, the Appellant has also filed this Notice of Appeal with the Clerk of the Texas Court of Criminal Appeals, since a certified copy of the record was forwarded to said court in connection with the appeal from the trial court.

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON
Robert D. Lemon
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ATTORNEYS FOR APPELLANT

/s/ R.D. Lemon
Of Counsel

CERTIFICATE OF SERVICE

A copy of the foregoing appeal was hand delivered to William L. Rivers, Ochiltree County Attorney, and placed in the U.S. Mail, Certified, Return Receipt Requested, to the Honorable Mark White, Attorney General of the State of Texas, Supreme Court Building, Austin, Texas 78711.

DATE: January 4, 1980.

/s/ Robert D. McCutcheon
Robert D. McCutcheon

Supreme Court, U. S.
FILED
MAY 28 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5962

DANNY VINCENT,

Appellant,

—vs.—

STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE
TEXAS COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT FILED JANUARY 8, 1980
JURISDICTION POSTPONED APRIL 14, 1980

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RELEVANT DOCKET ENTRIES

5/18/77—Def. does not appear for arrn. S/O to bring him before court on 5/23/77.

5/23/77—Case called. Def., counsel & D.A. ready. Def. pleads guilty. Admonishment given & plea accepted. Evidence heard. Def. found guilty. Punishment assessed at 6 yrs. TDC & $2000 fine. T.D.C. time probated & def. sentenced on fine. Def. waives appeal.

10/3/77—Motion to Revoke and Order for Warrant.

4/10/78—Revocation tried.

4/24/78—Revocation ordered. Def. to be sentenced later.

7/10/78—Def. sentenced to 6 yrs. T.D.C.

7/13/78—Filed Notice of Appeal.

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

INDICTMENT

The Grand Jurors for the County of Ochiltree, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the April Term, A.D. 1977, of the 84th Judicial District Court of said County, upon their oaths present in and to said Court, that Danny Vincent, on or about the 15th day of November, A.D. 1976, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly and without the effective consent of Billy Herndon, enter a habitation owned by the said Billy Herndon, and did then and there attempt to commit theft, to-wit: did then and there unlawfully attempt to obtain property from Billy Herndon, the owner thereof, without the effective consent of the said Billy Herndon, and with intent to deprive said owner of said property,

AGAINST THE PEACE AND DIGNITY OF THE STATE.

/s/ Nell May Field
Foreman of the Grand Jury

ORIGINAL

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84th JUDICIAL DISTRICT

April Term, 1977

May 23, 1977

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

JUDGMENT

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, Danny Vincent, having heretofore been duly arraigned as required by law, appeared in person and by counsel, the Honorable Danna Kay Archer (and the Defendant, together with his said counsel, having, by written notice filed herein, waived the time allowed by law to prepare for trial), and both parties announced ready for trial, and the said Defendant, in open Court, in person, pleaded guilty to the charge contained in the Indictment. Thereupon the said Defendant was admonished by the Court of the consequences of his said plea, including, in particular, an admonition as to the punishment prescribed by law for the offense with which the said Defendant is charged herein, and the said Defendant persisted in making such plea; and it plainly appearing to the Court that said Defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of the said Defendant is by the Court received, and here now entered of record upon the Minutes of the Court as the plea herein of said Defendant. And it further appearing to the Court that

before entering said plea, the Defendant has made application in writing to waive the right of trial by jury, which said application in writing, together with the consent and approval of the Attorney representing the State in writing, and signed by the said Attorney representing the State, has been filed in the papers of this cause before the said Defendant entered his said plea, and which said application the Court here now consents to and approves and here now enters of record upon the Minutes of the Court, and the said Defendant has here now in open court, in person, and in writing, waived his right to trial by a jury herein; whereupon, the Court proceeded to hear the case without a jury, and the Court having heard the indictment read, the said Defendant's said plea thereto, and having heard the evidence submitted, finds the said Defendant to be guilty of the offense of Burglary, as charged in the Indictment, and as confessed by him in his plea thereto, and assesses his punishment at a $2,000.00 fine.

It is therefore considered by the Court that the Defendant, Danny Vincent is adjudged to be guilty of the offense of Burglary as found by the Court, and that he be punished as has been determined by the Court by a $2,000.00 fine, and that the State of Texas do have and recover of the said Defendant, all costs in this prosecution expended, for which execution will issue, and that the said Defendant be remanded to jail to await the further order of this Court herein.

/s/ Richard N. Countiss
Judge Presiding

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84th JUDICIAL DISTRICT

April Term, 1977

May 23, 1977

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

SENTENCE

This day, this cause being again called, the State appeared by her District Attorney, and the Defendant, Danny Vincent, was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced against him in accordance with the Judgment heretofore rendered and entered herein. Thereupon the said Defendant, together with his counsel herein, the Hon. Danna Kay Archer, both being present in person in open court, waived the time allowed by law for making the Motion for New Trial and the Motion in Arrest of Judgment, and requested the Court to pronounce sentence herein immediately. And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence of the law should not be pronounced against him and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, his counsel also being present in open court as aforesaid, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said Defendant, who has been adjudged to be Guilty of the offense of Burglary of Habitation and whose punishment

has been adjudged at a $2,000.00 fine, be delivered to the custody of the Probation Office for processing as to his Application for Adult Probation which has been granted this day as to the term of confinement in the Texas Department of Corrections assessed in the Judgment of Probation entered this date and that the defendant be then released upon his own recognizance and upon the terms and conditions of the said Judgment of Probation entered this date.

/s/ Richard N. Countiss
Judge Presiding

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84th JUDICIAL DISTRICT

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

APPLICATION FOR ADULT PROBATION

TO THE SAID HONORABLE COURT:

Now comes Danny Vincent, Defendant in the above entitled and numbered cause, wherein he is charged by indictment with the offense of Burglary of Habitation and shows the Court:

(a). That the ends of justice and the best interests of the public as well as the Defendant will be subserved by the Courts granting this Defendant the benefits of the Adult Probation laws of this State.

(b). That, if granted probation, this Defendant will, during the period of probation comply with all of the terms and conditions provided by Article 42.12 of the Code of Criminal Procedure of the State of Texas, and such other and further terms and conditions as the Court may see fit to impose upon him.

WHEREFORE, Defendant prays that upon his conviction herein, and if his punishment does not exceed ten (10) years imprisonment in the penitentiary, that the Court appoint a probation officer, that the imposition and execution of sentence be suspended and that this Defendant be placed on probation for the maximum period of the punishment imposed in accordance with the provisions of the Adult Probation laws of the State of Texas.

/s/ Danny Vincent
Defendant

SWORN TO AND SUBSCRIBED BEFORE ME by the said Danny Vincent on this the 23rd day of May 1977, to certify which witness my hand and seal of office.

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84TH JUDICIAL DISTRICT

April Term, 1977

Date May 23, 1977

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

JUDGMENT (PROBATION)

This day this cause was called for trial, and the State appeared by her District Attorney, and the Defendant, Danny Vincent, having heretofore been duly arraigned as required by law, appeared in person and by counsel, the Honorable Danna Kay Archer and (the Defendant, together with his counsel, having, by written notice filed herein, waived the time allowed by law to prepare for trial), both parties announced ready for trial, and the said Defendant, in open Court, in person, pleaded guilty to the charge contained in the Indictment. Thereupon the said Defendant was admonished by the Court of the consequences of his said plea, including, in particular, an admonition as to the punishment prescribed by law for the offense with which the said Defendant is charged herein, and the said Defendant persisted in making such plea; and it plainly appearing to the Court that said Defendant is sane, and that he is uninfluenced in making said plea by any consideration of fear or by any persuasion or delusive hope of pardon prompting him to confess his guilt, the said plea of the said Defendant is by the Court received, and here now entered of record upon the Minutes of the Court as the plea herein of said Defendant. And it further appearing to the Court that before entering said plea, the Defendant has made application in writing to waive the right of trial by jury,

which said application in writing, together with the consent and approval of the Attorney representing the State in writing, and signed by the said Attorney representing the State, has been filed in the papers of this cause before the said Defendant entered his said plea, and which said application the Court here now consents to and approves and here now enters of record upon the Minutes of the Court, and the said Defendant has here now in open court, in person, and in writing, waived his right to trial by a jury herein; whereupon, the Court proceeded to hear the case without a jury, and the Court having heard the indictment read, the said Defendant's said plea thereto, and having heard the evidence submitted, finds the said Defendant to be guilty of the offense of Burglary, as charged in the Indictment, and as confessed by him in his plea thereto, and assesses his punishment at confinement in the penitentiary for 6 (six) years.

It is therefore considered by the Court that the Defendant, Danny Vincent is adjudged to be guilty of the offense of Burglary as found by the Court, and that he be punished as has been determined by the Court, by confinement in the penitentiary for 6 (six) years, and that the State of Texas do have and recover of the said Defendant all costs in this prosecution expended.

And it further appearing to the Court that the said Defendant has made his written and sworn application for Adult Probation, under the terms and provisions of the Adult Probation Laws of the State of Texas, and it appearing by the proof that the said Defendant has not been previously convicted of any felony offense, in this State or in any other State, and it further appearing to the Court that the ends of justice and the best interests of the public, as well as the Defendant, will be subserved, if the imposition of the sentence herein be suspended, and he be placed upon probation, upon the terms and conditions hereinafter set out:

IT IS THEREFORE ACCORDINGLY FURTHER ORDERED, ADJUDGED AND DECREED, on this same day, that the imposition of the sentence herein on the said Defendant be, and it is hereby suspended, and he is hereby placed upon probation, for a period of 6 (six)

years from this date, and upon the following terms and conditions:

(a). That he commit no offense against the laws of this or of any other State or of the United States.

(b). That he avoid injurious or vicious habits.

(c). That he avoid persons or places of disreputable or harmful character.

(d). That he become personally acquainted with the clergyman of some church of his choice and that he attend church services as often as his employment permits.

(e). That he work faithfully at suitable employment as far as possible, and support his dependents.

(f). That he remain within the confines of Ochiltree County, Texas until, and unless, his probation officer shall give him written permission to leave the county temporarily or to reside elsewhere.

(g). That he permit the probation officer to visit him at his home or elsewhere, as said probation officer may desire.

(h). That he refrain absolutely from drinking intoxicants in all forms.

(i). That he pay the costs of court, through the Probation Officer, within 90 (ninety) days after this date.

(j). That he pay a regular probation fee of $10.00 per month, through the Probation Officer, for the use and benefit of this county, beginning the 1st day of June 1977.

(k). The court hereby appoints and designates H. L. Wilbanks, the District Probation Officer and his successors to serve as Probation Officer herein. It is a further condition and term of this probation that the Defendant make monthly re-

ports, in writing and under oath, to the Probation Officer, beginning the 1st day of June, 1977, concerning his place of employment, wages earned, and concerning his compliance with all of the terms and conditions hereof, in such form as may be prescribed by the Probation Officer.

(l). That in any month in which he is unable to pay his probation fee, his proportionate part of his court costs, and his proportionate part of restitution, if any, he will file a written report with the District Probation Officer listing his income and expenses for said month.

(m). That he pay the fine of $2,000.00 assessed in the Judgment and Sentence of this date within the term of his probation.

(n). That he pay restitution to the injured party in an amount to be determined by the probation officer within six months of this date.

And it is further ordered that the said Defendant be and he is hereby released from custody, upon his personal recognizance in the sum of $1,000.00 dollars, conditioned for his faithful obedience to the terms and provisions contained herein.

/s/ Richard N. Countiss
Judge Presiding

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84TH JUDICIAL DISTRICT

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

MOTION FOR WARRANT AND
TO REVOKE PROBATION

TO THE SAID HONORABLE COURT:

Now comes the State of Texas, by and through her District Attorney, joined by the Probation Officer herein, and respectfully shows to the Court that the above named Defendant, who was heretofore, on the 23rd day of May, 1977, duly convicted in the above entitled and numbered cause, of the offense of BURGLARY, and who was, on said date, placed on Probation by the Court for a term of Six years, has, since his conviction, and during the term of his said Probation, violated the terms thereof, in the following particulars:

1. He has violated Article A of his probation judgment, as ordered by the court, in that on or about September 28, 1977 in the City of Perryton, Ochiltree County, Texas, he committed the offense of Criminal Trespass.

2. He has violated Article A of his probation judgment, as ordered by the court, in that on or about September 28, 1977 in the City of Perryton, Ochiltree County, Texas, he committed the offense of Possession of Marihuana of less than Four (4) ounces.

WHEREFORE, the State prays that a Warrant issue for the Arrest of the said Defendant, DANNY VIN-

CENT; that the Probation heretofore granted to the said Defendant be revoked by the Court, and that the sentence of the law be pronounced against the Defendant, as provided by law.

/s/ [Illegible]
District Attorney
84th Judicial District

/s/ H. L. Wilbanks
Probation Officer
84th Judicial District

IN THE 84TH JUDICIAL DISTRICT COURT OF OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

MOTION

To said Honorable Court:

Comes now Danny Vincent, defendant in this case and moves the court to release defendant from jail. As a condition of release, defendant agrees to abide by all of the terms and conditions of probation previously imposed in this case and agrees to abide by the following additional terms and conditions:

1. Defendant will report to the 84th. Judicial District Probation Officer once a week from this date until given permission to do otherwise.

2. Defendant will not associate with anyone known to use or to have used drugs of any type.

3. Defendant will submit himself to the court, at such time as the court may designate for a hearing on the states motion to revoke probation.

Respectfully submitted this 18th day of October, 1977.

/s/ Danny D. Vincent

Defendant

_____

Attorney for Defendant

IN THE 84TH JUDICIAL DISTRICT
COURT OF OCHILTREE COUNTY, TEXAS

ORDER—Filed Oct. 18, 1977

The foregoing motion for release from jail was this day considered by the court, and the court finds that said motion should be granted.

It is therefore ordered that defendant be released from jail, on his own recognizance. It is further ordered that defendant comply with all the terms and conditions of probation as previously imposed and comply with the following additional terms and conditions of probation:

1. Defendant will report to the 84th. Judicial District Probation Officer once a week from this date until given permission to do otherwise.

2. Defendant will not associate with anyone known to use or to have used drugs of any type.

3. Defendant will submit himself to the court, at such time as the court may designate for a hearing on the states motion to revoke probation.

Entered this 18th day of October, 1977.

/s/ Richard N. Countiss
RICHARD N. COUNTISS
Judge Presiding

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84TH JUDICIAL DISTRICT

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

SUPPLEMENTARY MOTION FOR WARRANT
AND TO REVOKE PROBATION

TO THE SAID HONORABLE COURT:

Now comes the State of Texas, by and through her District Attorney, joined by the Probation Officer herein, and respectfully shows to the Court that the above named Defendant, who was heretofore, on the 23rd day of May, 1977, duly convicted in the above entitled and numbered cause, of the offense of BURGLARY, and who was, on said date, placed on Probation by the Court for a term of Six years, has, since his conviction, and during the term of his said Probation, violated the terms thereof, in the following particulars:

1. He has violated Article A of his probation judgment, as ordered by the Court, in that on or about February 4, 1978 in the City of Perryton, Ochiltree County, Texas, he committed the offense of Driving While Intoxicated.

2. He has violated Article H of his probation judgment, as ordered by the Court, in that on or about February 4, 1978 he failed to refrain absolutely from drinking intoxicants in all forms.

3. He has violated Article J of his probation judgment, as ordered by the Court, in that he has failed to pay a regular probation fee of $10.00 per

month through the probation office for the months of January and February, 1978, and is now in arrears the sum of $20.00.

4. He has violated Article K of his probation judgment, as ordered by the Court, in that he has failed to make monthly reports in writing under oath to the Probation Officer for the Month of January, 1978.

WHEREFORE, the State prays that a Warrant issue for the Arrest of the said Defendant, DANNY VINCENT; that the Probation heretofore granted to the said Defendant be revoked by the Court, and that the sentence of the law be pronounced against the Defendant, as provided by law.

/s/ William L. Rivers
Ochiltree County Attorney
84th Judicial District

/s/ H. L. Wilbanks
Probation Officer
84th Judicial District

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84TH JUDICIAL DISTRICT

No. 1494 (Criminal)

THE STATE OF TEXAS

vs.

DANNY VINCENT

ORDER FOR WARRANT

On this the 4th day of February, 1978, come on to be considered the State's MOTION FOR WARRANT AND TO REVOKE PROBATION filed herein, alleging that the Defendant herein is in violation of his probation, granted by the Court on the 23rd day of May, 1977; and the Court having read and considered the said Motion, and having heard and considered the evidence offered by the State in support thereof, and the Court being of the opinion that a Warrant should be issued for the arrest of the said Defendant, with the view that he be brought before the Court for hearing upon the State's Motion to Revoke Probation:

IT IS THEREFORE ACCORDINGLY ORDERED on this same day that the Clerk of this Court issue a warrant for the arrest of the said Defendant, DANNY VINCENT, commanding that he be brought before this Court INSTANTER, to answer the State of Texas for an offense against the laws of Texas, to-wit, BURGLARY, upon the State's Motion to Revoke Probation.

/s/ Richard N. Countiss
Judge Presiding

THE STATE OF TEXAS

TO THE PROBATION OFFICER,
SHERIFF OR ANY CONSTABLE OF
OCHILTREE COUNTY, TEXAS

GREETINGS:

WHEREAS, on the 23rd day of May, 1977, in cause No. 1494 on the Criminal Docket of the District Court of Ochiltree County, Texas, entitled THE STATE OF TEXAS VS. DANNY VINCENT the Defendant, Danny Vincent was duly and legally convicted of the offense of BURGLARY and was placed upon Probation for a term of (6) Six years;

AND WHEREAS, on the 6th day of February, 1978, the State filed herein its certain MOTION FOR WARRANT AND TO REVOKE PROBATION.

AND WHEREAS, pursuant to said Motion, the Honorable District Court of Ochiltree County, Texas, did make and enter its certain ORDER FOR WARRANT, under date of February 6, 1978, directing the Clerk of said Court to issue a Warrant for the arrest of the said Defendant, INSTANTER:

NOW THEREFORE, YOU ARE COMMANDED to take the body of the said Defendant and bring him before the Honorable District Court of Ochiltree County, Texas, at the Courthouse in Perryton, Texas, INSTANTER, then and there to answer the STATE OF TEXAS for an offense against the laws of said State, to-wit, Burglary upon the State's Motion to Revoke Probation on file in said cause.

HEREIN FAIL NOT, but have you then and there, before said Court, this writ with your return endorsed thereon showing how you have executed the same.

WITNESS MY HAND AND SEAL OF OFFICE, in Perryton, Texas, on this the 6th day of February, A.D. 1978.

/s/ Nora Taliaferra
Clerk, District Court
Ochiltree County, Texas

By _____
Deputy

WARRANT OF ARREST
INSTANTER

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

/s/ Nora Taliaferra

Issued February 6, 1978

Clerk District Court
Ochiltree County, Texas

By _____ Deputy

[Filed Clerk Dist. Court Ochiltree Co., Tex.
4:20 O'Clock PM—Feb. 6, 1978]

/s/ Nora Taliaferra
By /s/ Nora Taliaferra

OFFICER'S RETURN

Came to hand the 6th day of February 1978, at 2:30 o'clock P.M., and executed on the 6th day of February 1978, at 4:15 o'clock P.M., by arresting the within named Danny Vincent at Perryton in Ochiltree County, and * placing him in jail at Ochiltree County Jail.

I actually and necessarily traveled 2 miles in the service of this writ, in addition to any other mileage I may have traveled in the service of other process in this cause during the same trip.

FEES—Making Arrest ..... $ _____
Mileage ..... _____
_____
_____
_____
Total ..... $ _____

* Erase according to facts.

/s/ H. L. Wilbanks
Probation Officer
_____ County, Texas

By _____ Deputy

IN THE 84TH JUDICIAL DISTRICT COURT
IN AND FOR OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY DWANE VINCENT

ORDER SETTING DATE FOR HEARING

On this the 6th day of FEBRUARY, 1978, motion to revoke probated sentence of DANNY DWANE VINCENT, defendant in the above entitled and numbered cause, having been presented to the court by William L. Rivers, Ochiltree County Attorney, and the same having been considered by the court;

It is therefore ORDERED, ADJUDGED and DECREED by the Court that DANNY DWANE VINCENT appear before this Court on the 27th day of MARCH, 1978, at 10:00, A.M., on the said date, in the regular Courtroom of the Courthouse in Ochiltree County, Texas, to show cause, if any he have, why probation should not be revoked in this cause.

It is further ORDERED, ADJUDGED and DECREED by the Court that the Clerk of the District Court of Ochiltree County, Texas, shall attach to said notice a certified copy of the motion presented to said court by William L. Rivers, Ochiltree County Attorney, and filed herein, to be served upon the said DANNY DWANE VINCENT.

/s/ Richard N. Countiss
Judge Presiding

Filed 3-2-1978

IN THE 84TH JUDICIAL DISTRICT COURT
IN AND FOR OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY DWANE VINCENT

NOTICE OF HEARING

To: DANNY DWANE VINCENT, GREETINGS:

You are hereby commanded to be and appear before the Honorable Richard N. Countiss, District Judge of the 84th Judicial District Court of Ochiltree County, Texas, at the Courthouse in Perryton, Texas, on the 27th day of March, 1978, at 10:00 A.M., then and there to show cause, if any, why probation should not be revoked in this cause, as prayed for in the State's Motion to Revoke Probated Sentence, a certified copy of which motion is attached hereto and made a part of this notice.

You are informed that you have the right to be represented by an attorney of your choice at such hearing, to cross examine witnesses for the State of Texas and to offer evidence in your behalf.

And whereas the Judge of said Court has made this Fiat, as follows:

A certified copy of the Judge's Fiat setting date for hearing is attached hereto and made a part of this return.

Herein fail not, but of this writ, and how you have executed the same, made due return.

Witness: Nora Taliaferro, Clerk of the District Court of Ochiltree County, Texas.

Given under my hand and seal of office at Perryton this the 2nd day of March, 1978.

Clerk,
Ochiltree County Court
Ochiltree County, Texas

SHERIFF'S RETURN

Came to hand on the 2 day of March, 1978, and executed on the 2 day of March, 1978, by delivering to DANNY DWANE VINCENT, the within named defendant, in person, a true copy of this notice, together with the accompanying true and correct and certified copy of State's Motion to Revoke Probated Sentence and the Court's Fiat therein setting date for hearing.

JIMMIE D. RHOADES
Sheriff,
Ochiltree County, Texas

By /s/ Gwen McKnight,
Deputy

IN THE DISTRICT COURT FOR THE
84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

STATE'S AMENDED SUPPLEMENTARY MOTION TO REVOKE PROBATION—Filed March 31, 1978

TO THE SAID HONORABLE COURT:

Now comes the State of Texas, by and through her Ochiltree County Attorney, joined by the Probation Officer herein, and respectfully shows to the Court that the above named Defendant, who was heretofore, on the 23rd day of May, 1977, duly convicted in the above entitled and numbered cause, of the offense of BURGLARY and who was, on said date, placed on Probation by the Court for a term of Six (6) years, has, since his conviction, and during the term of his said Probation, violated the terms thereof, in the following particulars:

(1) He has violated Article A of his probation judgment, as ordered by the Court, in that on or about February 4, 1978, in the City of Perryton, County of Ochiltree, he committed the offense of Driving While Intoxicated, an offense against the laws of the State of Texas; to-wit: Vernon's Annotated Civil Statutes, Article 67 01 l-1, in that the said Defendant on or about February 4, 1978, in the City of Perryton, Ochiltree County, Texas, did then and there operate a motor vehicle upon a public street within the incorporated City of Perryton, County of Ochiltree, State of Texas, while said Defend-

ant was intoxicated or under the influence of intoxicating liquor.

(2) He has violated Article H of his probation judgment, as ordered by the Court, in that on or about February 4, 1978, he failed to refrain absolutely from drinking intoxicants in all forms.

(3) He has violated Article J of his probation judgment, as ordered by the Court, in that he has failed to pay a regular probation fee of $10.00 per month through the probation office for the months of January and February, 1978, and is now in arrears the sum of $20.00.

(4) He has violated Article K of his probation judgment, as ordered by the Court, in that he has failed to make monthly reports in writing under oath to the Probation Officer for the Month of January, 1978.

WHEREFORE, the State prays that a Warrant issue for the Arrest of the said Defendant, Danny Vincent; that the Probation heretofore granted to the said Defendant be revoked by the Court, and that the sentence of the law be pronounced against the Defendant, as provided by law.

/s/ William L. Rivers
WILLIAM L. RIVERS
Ochiltree County Attorney

/s/ [Illegible]
Asst. Probation Officer
84th Judicial District

IN THE DISTRICT COURT FOR THE
84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

REVOCATION OF PROBATION

On the 23rd day of May, 1977, Defendant was duly and legally convicted of the offense of Burglary in the above entitled and numbered cause and punishment was assessed at Six (6) years confinement in the Texas Department of Corrections, and the imposition of sentence was suspended during the good behavior of Defendant, and the Defendant was placed on probation for a period of Six (6) years upon the following terms and conditions, to-wit: that during the term of probation the Defendant shall:

(a) That he commit no offense against the laws of this or any other State or of the United States.

(b) That he avoid injurious or vicious habits.

(c) That he avoid persons or places of disreputable or harmful character.

(d) That he become personally acquainted with the clergyman of some church of his choice and that he attend church services as often as his employment permits.

(e) That he work faithfully at suitable employment as far as possible, and support his dependents.

(f) That he remain within the confines of Ochiltree County, Texas, until, and unless, his probations

officer shall give him written permission to leave the county temporarily or to reside elsewhere.

(g) That he permit the probation officer to visit him at his home or elsewhere, as said probation officer may desire.

(h) That he refrain absolutely from drinking intoxicants in all forms.

(i) That he pay the costs of Court, through the Probation Officer, within 90 days after the date of judgment.

(j) That he pay a regular probation fee of $10.00 per month, through the Probation Officer, for the use and benefit of this county, beginning the 1st day of June, 1977.

(k) That the court hereby appoints and designates H. L. Wilbanks, the District Probation Officer and his successors to serve as Probation Officer herein. It is a further condition and term of this probation that the Defendant make monthly reports, in writing and under oath, to the Probation Officer, beginning the 1st day of June, 1977, concerning his place of employment, wages earned, and concerning his compliance with all of the terms and conditions hereof, in such form as may be prescribed by the Probation Officer.

(l) That in any month in which he is unable to pay his probation fee, his proportionate part of his court costs, and his proportionate part of restitution, if any, he will file a written report with the District Probation Officer listing his income and expenses for said month.

(m) That he pay the fine of $2,000.00 assessed in the Judgment and Sentence of this date within the term of his probation.

(n) That he pay restitution to the injured party in an amount to be determined by the Probation Officer within six (6) months of this date.

On the 6th day of February, 1978, the County Attorney of Ochiltree County, Texas, together with the Probation Officer of the 84th Judicial District filed a Supplementary Motion for Warrant and to revoke probation, setting out the respects in which the Defendant had violated the conditions of probation, and on the 31st day of March, 1978, the County Attorney of Ochiltree County, Texas, together with the Probation Officer of the 84th Judicial District, filed its Amended Supplementary Motion to Revoke further defining the respects in which the Defendant had violated the conditions of probation, to-wit:

> (1) He has violated Article A of his probation judgment, as ordered by the court, in that on or about February 4, 1978, in the City of Perryton, County of Ochiltree, he committed the offense of Driving While Intoxicated, an offense against the laws of the State of Texas; to-wit: Vernon's Annotated Civil Structures, Article 67 01 L-1, in that the said Defendant on or about February 4, 1978, in the City of Perryton, Ochiltree County, Texas, did then and there operate a motor vehicle upon a public street within the incorporated City of Perryton, County of Ochiltree, State of Texas, while said Defendant was intoxicated or under the influence of intoxicating liquor.
>
> (2) He has violated Article H of his probation judgment, as ordered by the Court, in that on or about February 4, 1978, he failed to refrain absolutely from drinking intoxicants in all forms.
>
> (3) He has violated Article J of his probation judgment, as ordered by the Court, in that he has failed to pay a regular probation fee of $10.00 per month through the probation office for the months of January and February, 1978, and is now in arrears the sum of $20.00.
>
> (4) He has violated Article K of his probation judgment, as ordered by the Court, in that he has failed to make monthly reports in writing under oath to

the Probation Officer for the month of January, 1978.

On the 10th day of April, 1978, the Defendant appeared in open Court in person, his Attorney, Robert D. McCutcheon, also being present, and the State appeared by her County Attorney and the Probation Officer of said Court, and after examining said written report and hearing the evidence offered by both the State and Defendant, the Court is of the opinion that the Defendant, Danny Vincent, violated the terms and conditions of his probation in the following respects:

(1) That he violated Article A of his probation judgment, in that on or about February 4, 1978, in the City of Perryton, County of Ochiltree, he committed the offense of driving while intoxicated, an offense against the laws of the State of Texas, to-wit: Vernon's Annotated Civil Statutes, Article 67 01 L-1.

(2) He has violated Article H of his probation judgment, in that on or about February 4, 1978, he failed to refrain absolutely from drinking intoxicants of all forms.

It is therefore ORDERED, ADJUDGED and DECREED by the Court that the Order suspending the imposition of the sentence, and placing Defendant on probation, heretofore entered in this said cause be, and the same is hereby revoked. Said Defendant is hereby continued on the same bond previously set in this cause pending further orders of this Court.

ENTERED THIS 1st DAY OF June, 1978.

/s/ Richard N. Countiss
Judge Presiding

Filed June 5, 1978 2:45 PM

IN THE DISTRICT COURT OF
OCHILTREE COUNTY, TEXAS
84TH JUDICIAL DISTRICT

APRIL TERM, 1978

Date: July 10, 1978

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

SENTENCE (After Probation Revoked)

This day, this cause being again called, the State appeared by her District Attorney, and the Defendant, DANNY VINCENT, who was heretofore granted probation under the terms and conditions of the Judgment made and entered herein on the 23rd day of May, 1977, and whose said probation was revoked by order of this Court on the 10th day of April, 1978, was brought into open court in person, in charge of the Sheriff, for the purpose of having the sentence of the law pronounced against him in accordance with the Judgment herein rendered and entered against him, as aforesaid. And thereupon the said Defendant, together with his counsel, the Honorable John Irwin, both being present in open court, waived the time allowed by law after revocation of probation and prior to the pronouncement of sentence, and requested the Court to pronounce sentence herein immediately. And thereupon the said Defendant was asked by the Court whether he had anything to say why sentence of the law should not be pronounced against him and he answered nothing in bar thereof. Whereupon the Court proceeded, in the presence of said Defendant, his counsel also being present in open court as aforesaid, to pronounce sentence against him as follows:

IT IS THE ORDER OF THE COURT that the said Defendant, who has been adjudged to be Guilty of the offense of Burglary and whose punishment has been adjudged at confinement in the penitentiary for a term of Six (6) years, be delivered by the Sheriff of this County immediately to the Director of Corrections of the Texas Department of Corrections, or other person legally authorized to receive such convicts, and the said Defendant shall be confined in the State Penitentiary for a term not less than 2 years nor more than 6 years in accordance with the provisions of law governing the penitentiaries and the Texas Department of Corrections.

The said Defendant is allowed ——— days credit upon this sentence for time spent in jail since the time of his arrest and confinement herein.

And the said Defendant is hereby remanded to jail until the said Sheriff can obey the directions of this sentence.

/s/ Richard N. Countiss
Judge Presiding

Filed July 11, 1978

IN THE DISTRICT COURT FOR THE
84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

NOTICE OF APPEAL—July 13, 1978

Defendant, DANNY VINCENT, hereby gives notice of his intent to appeal from the revocation of his probation in the above styled case, and the sentence thereon rendered against him on July 10, 1978 to the Court of Criminal Appeals for the State of Texas.

LEMON, CLOSE, ATKINSON,
SHEARER & MCCUTCHEON
ROBERT D. MCCUTCHEON
Interstate Savings & Loan
Building
P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

Attorneys for Defendant

/s/ Robert D. McCutcheon
Of Counsel

CERTIFICATE OF SERVICE (omitted in printing)

IN THE DISTRICT COURT FOR THE
84TH JUDICIAL DISTRICT
OCHILTREE COUNTY, TEXAS

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

DESIGNATION OF MATERIAL FOR INCLUSION IN THE RECORD—Sept. 7, 1978

Defendant, DANNY VINCENT, hereby specifies the following matter for inclusion in the record on appeal pursuant to the provisions of Article 40.09(2) of the Code of Criminal Procedure.

1. Judgment (Probation) dated May 23, 1977
2. Judgment dated May 23, 1977
3. Sentence dated May 23, 1977
4. Motion for Warrant and to Revoke Probation
5. Order for Warrant dated September 30, 1977
6. Motion and Order dated October 18, 1977
7. Supplementary Motion for Warrant and to Revoke Probation
8. Order for Warrant dated February 4, 1978
9. Warrant dated February 6, 1978 with Officer's Return
10. Order Setting Date for Hearing dated February 6, 1978
11. Notice of Hearing, dated March 2, 1978 and Sheriff's Return
12. Defendants Motion to Quash and Special Exceptions
13. Order Overruling in Part and Sustaining in Part

14. States Amended Supplementary Motion to Revoke
15. Order Appointing Counsel dated March 20, 1978
16. Order Appointing Counsel dated March 24, 1978
17. Order of Revocation of Probation dated May 23, 1978
18. Order Appointing Counsel dated July 10, 1978
19. Sentence dated July 10, 1978
20. Order Setting Appeal Bond dated July 10, 1978
21. Notice of Appeal
22. Statement of Facts

LEMON, CLOSE, ATKINSON,
SHEARER & MCCUTCHEON
ROBERT D. MCCUTCHEON
Interstate Savings & Loan
Bldg.
P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

Attorneys for Defendant

/s/ Robert D. McCutcheon
Of Counsel

CERTIFICATE OF SERVICE (omitted in printing)

IN THE 84TH DISTRICT COURT
OCHILTREE COUNTY, TEXAS

OCTOBER TERM, 1978

_____, 1979

No. 1494

THE STATE OF TEXAS

vs.

DANNY VINCENT

FINAL ORDER OF THE COURT OF APPEALS

BE IT REMEMBERED that on this the 15th day of January, A. D. 1979, the Court had before it the Record on Appeal in the above styled and numbered cause and the Court having described from the record, refused to grant a New Trial herein.

IT IS THEREFORE ORDERED that the Clerk of the Court shall promptly transmit the record to the Court of Criminal Appeals at Austin, Texas.

/s/ Richard N. Countiss
Judge

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

OPINION

On May 23, 1977, the appellant pleaded guilty to burglary and was granted six years' probation. On April 10, 1978, his probation was revoked.

On appeal from the revocation of probation, the appellant sets forth two grounds of error. Both grounds complain of the "failure" of the Texas system of probation to provide a preliminary hearing of the kind discussed in Gagnon v. Scarpelli, 411 U.S. 778 (1973). This argument was rejected in Whisenant v. State, 557 S.W.2d 102 (Tex.Cr.App. 1977), and it does not require further discussion today.

The judgment is affirmed.

PER CURIAM OPINION
586 S.W.2d 880

DELIVERED: September 19, 1979

By: Panel No. 2, 1st Quarter, 1979

COMPOSED OF: Leon Douglas, Judge
Truman Roberts, Judge
Wendell Odom, Judge

SUPREME COURT OF THE UNITED STATES

No. 79-5962

DANNY VINCENT, APPELLANT,

v.

TEXAS

ON CONSIDERATION of the motion of appellant for leave to proceed *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

April 14, 1980

SUPREME COURT OF THE UNITED STATES

No. 79-5962

DANNY VINCENT, APPELLANT,

v.

TEXAS

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

April 14, 1980

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5962

* * *

DANNY VINCENT,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The Texas Court Of Criminal Appeals

* * *

MOTION OF APPELLEE STATE OF TEXAS TO DISMISS OR AFFIRM

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

* * *

NO. 79-5962

* * *

DANNY VINCENT,
Appellant

V.

THE STATE OF TEXAS,
Appellee

* * *

On Appeal From The Texas Court Of Criminal Appeals

* * *

MOTION OF APPELLEE STATE OF TEXAS TO DISMISS OR AFFIRM

* * *

The Attorney General of Texas, on behalf of the State of Texas, Appellee herein, moves to dismiss the appeal or affirm the judgment of the Texas Court of Criminal Appeals in this case. Rule 16(1)(a), and (b).

OPINIONS BELOW

Appellant Danny Vincent seeks review in this Court of a decision entered by the Texas Court of Criminal Appeals, a copy of which is attached as Appendix A to Vincent's Jurisdictional Statement.

JURISDICTION

The Texas Court of Criminal Appeals entered its last opinion in this case on September 19, 1979. Rehearing was denied on October 10, 1979. Contrary to the statement in Vincent's Appendix D, a Notice of Appeal has never been filed with the Texas Court of Criminal Appeals, the court possessed of the record. (See Appellee's Appendix A).

Rule 11(1) of the Rules of this Court provides:

> 1. An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of

> the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

The ninety day period for filing a Notice of Appeal has elapsed.

Vincent invokes the jurisdiction of this Court under 28 U.S.C. §1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Vincent, who claims a right under the Fourteenth Amendment to the Constitution of the United States, wishes the Court to declare art. 42.12(8)(a), V.A.C.C.P., unconstitutional. The pertinent part of art. 42.12(8)(a), V.A.C.C.P., provides:

> At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested.... A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

QUESTION PRESENTED

Whether art. 42.12(8)(a), V.A.C.C.P., on its face and as applied, affords probationers such complete due process safeguards that a mandated preliminary hearing to determine probable cause for probation revocation is not necessary?

STATEMENT OF THE CASE

Danny Vincent, Appellant herein and defendant below, pled guilty to the offense of burglary on May 23, 1977,

in the 84th Judicial District Court of Ochiltree County, Texas, Case No. 1494. His punishment was assessed on that day as a $2,000.00 fine and six (6) years in the Texas Department of Corrections, probated. (Record v. 1, p. 6-7, hereinafter R. v. __, p. __).

On February 3, 1978, Vincent was arrested for Driving While Intoxicated, art. 6687b §30, V.A.T.S., and taken to the Perryton, Texas, sheriff's office where he was met by his probation officer, Jeff Hooper. (R. v. 2, p. 49). At this time Probation Officer Hooper gave Appellate Vincent his Miranda warnings. (R. v. 2 p. 30). A Motion For Warrant and to Revoke Probation was filed with the 84th Judicial District Court on the next day. (R. v. 1 p. 12). Vincent remained in jail from February 3, 1978 until March 28, 1978 (R. v. 2 p. 76).

After approximately two weeks in jail, Vincent was visited by Probation Officer Hooper who inquired whether Appellant had a lawyer and advised Vincent to retain one. (R. v. 2 p. 77). During the time he was in jail Vincent and his family unsuccessfully attempted to speak with a lawyer (R. v. 2 p. 76).

On March 2, 1978, a Notice of Hearing setting a hearing to determine why probation should not be revoked was filed with the court, and the hearing was set for March 27, 1978. (R. v. 1 p. 16). On March 27, 1978 the court appointed Robert McCutcheon as counsel for Vincent (R. v. 1 p. 23), heard formal pre-hearing motions (R. v. 1 pp. 17-20), and ordered Vincent's bond reduced (R. v. 1, p. 24).

A formal probation revocation hearing was held before the 84th District Court of Ochiltree County, Texas, on April 10, 1978. Three witnesses, including Probation Officer Hooper and the arresting police officer, testified for the State of Texas and three witness, including Vincent, testified for the defense. Vincent admitted at the hearing that he had violated the terms and conditions of his probation by

drinking and driving. (R. v. 2, pp. 83-84).

Appellant Vincent's probation was revoked by the Judge Countiss of the 84th District Court on June 1, 1978 (R. v. 1, pp. 28-30), and he was sentenced by the court to six (6) years in the Texas Department of Corrections July 7, 1978 (R. v. 1, p. 32).

The trial court record is vague as to certain aspects of this case. It does not reflect whether or not Vincent ever made a motion invoking the art. 42.12(8)(a) rule that a court must provide a probationer in jail a final hearing within twenty days of the probationer's motion. It does not indicate whether the court, State or Vincent instigated the March 2, 1978 Notice of Hearing. (R. v. 1 p. 16). Finally it does not reflect when and how Vincent's first bond was set although it does indicate a bond reduction on March 28, 1978. (R. v. 1 p. 24).

Vincent appealed to the Texas Court of Criminal Appeals challenging the probation revocation on grounds much like his grounds of appeal to this Court. (1) Art. 42.12(8)(a) V.A.C.C.P., is unconstitutional on its face for failure to provide a preliminary hearing and the attendant safeguards of Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.C. 1756, 36 L.Ed.2d 656 (1973) and (2) art. 42.12(8)(a) is unconstitutional as applied to Appellant Vincent for failure to provide a preliminary hearing and the attendant safeguards of Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra. Although the record indicates the trial court could not have complied with a twenty day limit for hearing the probation revocation, Appellant did not challenge the time discrepancy on appeal.

The Texas Court of Criminal Appeals affirmed the revocation in Vincent v. State, 586 S.W.2d 880 (Tex.Crim.App. 1979), an unpublished opinion (attached as Appendix A to Appellant's Brief). Motion for Rehearing was denied October 10, 1979.

MOTION TO DISMISS

This appeal should be dismissed for four reasons. They are as follows:

A. THE APPEAL IS NOT TIMELY.

As noted in the jurisdiction section, supra, contrary to Rule 11(1) of the Rules of this Court, Vincent's Notice of Appeal has never been received by the Texas Court of Criminal Appeals. The appeal should be dismissed pursuant to Richardson v. Blumenthal, 435 U.S. 939, 98 S.Ct. 1516, 55 L.Ed.2d 539 (1978); Gabriel v. United States, 429 U.S. 877, 97 S.Ct. 225, 50 L.Ed.2d 160 (1976); Charger Investments, Inc. v. Corbett, 429 U.S. 877, 97 S.Ct. 225, 50 L.Ed.2d 159 (1976); Taggart v. New York, 392 U.S. 667, 88 S.Ct. 2317, 20 L.Ed.2d 1360 (1967).

B. STATE LAW PROVIDES MORE PROTECTION OF APPELLANT'S RIGHTS THAN DUE PROCESS REQUIRES.

The present case is not an appropriate one in which to consider whether the Texas probation revocation procedures are unconstitutional. Through art. 42.12(8)(a), V.A.C.C.P., the State of Texas affords a probationer a final hearing on the revocation of probation within twenty days of a motion by a probationer who is in jail and unable to make bail.

This state created right to a speedy final hearing fulfills the due process consideration of providing a preliminary hearing for a probationer in that information is fresh, sources are available and there is no substantial time lag between the arrest and the final hearing. Morrissey v. Brewer, supra at 485.

C. THE RECORD FAILS TO ADEQUATELY REFLECT WHETHER APPELLANT VINCENT REQUESTED A PROBATION REVOCATION HEARING.

In this case, Vincent failed to avail himself of the art. 42.12(8)(a) provision for a speedy final adjudication of the probation revocation question. A careful review of the trial court record reveals no evidence of Vincent utilizing the art. 42.12(8)(a) twenty day provision by making a motion for the trial court to conduct a revocation hearing.

D. APPELLANT VINCENT FAILED TO PURSUE HIS STATE COURT REMEDIES.

Even if Vincent made such a motion for the court to conduct a probation revocation hearing before the trial court's order setting a hearing date, there is a twenty-six day time lapse between the March 2, 1978 court order and the March 28, 1978 hearing setting. (R. v. 1, p. 15). This twenty-six day period violates the art. 42.12(8)(a) twenty day statutory period. Although under the statute a trial court may continue the hearing for good cause shown by either the defendant or the state, no such evidence can be found in the record.

The Texas courts have construed the art. 42.12(8)(a) twenty day time period as a mandatory provision which requires the state to dismiss its motion to revoke probation if the time requirement is not complied with. Carney v. State, 573 S.W.2d 24, 26 (Tex.Crim.App. 1978); Ex parte Trillo, 540 S.W.2d 728, 732 (Tex.Crim.App. 1976). Yet in his direct appeal to the Texas Court of Criminal Appeals, Appellant chooses not to challenge the trial court's violation of a mandatory law. Cf. Cleland v. State, 572 S.W.2d 673, 674 (Tex.Crim.App. 1978). Appellant's only ground of appeal to the Texas court was a constitutional issue. Under these circumstances, it is unnecessary to decide whether a federal constitutional right to a preliminary hearing to determine if probable cause for probation revocation exists. Any such right is encompassed within the state created right to a speedy final hearing. Appellant failed to demand and preserve such a right.

MOTION TO AFFIRM

Art. 42.12(8)(a), on its face and as applied, affords probationers such complete due process safeguards that a mandated preliminary hearing to determine probable cause for probation revocation is not necessary.

Probation revocation procedures in Texas are closely related to formal criminal proceedings unlike the "typical" parole procedures recognized in Morrissey v. Brewer, 408 U.S. 471, 484, 92 S.Ct. 2593, 2602, 33 L.Ed.2d 484, 496

(1972) and the informal probation proceedings recognized in Gagnon v. Scarpelli, 411 U.S. 778, 789, 93 S.Ct. 1756, 1763, 36 L.Ed.2d 656, 665 (1973). Whisenant v. State, 557 S.W.2d 102, 104-05 (Tex.Crim.App. 1977). The Texas Court of Criminal Appeals has used this rationale to determine that Gagnon v. Scarpelli, supra, is inapplicable to Texas probation revocation proceedings. Whisenant v. State, supra at 103; Grant v. State, 505 S.W.2d 259, 260 (Tex.Crim.App. 1974); Ex parte Shivers, 501 S.W.2d 898, 900-01 (Tex.Crim.App. 1973).

A granting of probation in a Texas adjudication of guilt suspends the sentence until a judgment of revocation. [Arts. 42.12(3), 42.13(3), V.A.C.C.P., Clapper v. State, 562 S.W.2d 250, 252 (Tex.Crim.App. 1978); Savant v. State, 535 S.W.2d 190, 191 (Tex.Crim.App. 1976); Texas Attorney General Opinion M-W 133 (1980)]. As a result, the probation revocation procedure itself becomes an adversary proceeding where the rules of evidence and procedure are very similar to those of a criminal proceeding. Whisenant v. State, supra at 105; Masters v. State, 545 S.W.2d 180, 181 (Tex. Crim.App. 1977). The hearing is conducted before a judge of the district court. Art. 42.12(8)(a), V.A.C.C.P; Whisenant v. State, supra at 105; McClure v. State, 496 S.W.2d 588, 591 (Tex.Crim.App. 1973): Guillory v. State, 487 S.W.2d 327, 329 (Tex.Crim.App. 1972). The judge, upon request, makes specific findings of fact concerning the revocation. Whisenant v. State, supra, at 105; Sappington v. State, 508 S.W.2d 840, 841-42 (Tex.Crim.App. 1974); Guillory v. State, supra at 329; Gamble v. State, 484 S.W.2d 713, 715-16 (Tex.Crim.App. 1972).

Procedural differences between formal criminal trials and Texas probation revocation hearings include proof by preponderance of the evidence, [Wiersing v. State, 571 S.W.2d 356, 356 (Tex.Crim.App. 1972), Lovorn v. State, 536 S.W.2d 356, 356 (Tex.Crim.App. 1976)], allowing uncorraborated witness testimony at the hearing, [Richardson v. State, 487 S.W.2d

719, 721 (Tex.Crim.App. 1972)], and upon motion of the defendant, hearing the probation revocation within twenty days [Art. 42.12(8)(a), V.A.C.C.P., Carney v. State, supra at 26; Ex parte Trillo, supra at 732].

Because the Texas revocation procedures so closely resemble formal criminal procedures, the Texas Court of Criminal Appeals has consistently extended constitutional rights to probationers at revocation hearings including protection from unreasonable searches and seizures [Tamez v. State, 534 S.W.2d 686, 692 (Tex.Crim.App. 1976)], protection from confessions taken through the exploitation of an illegal arrest [Dowdy v. State, 534 S.W.2d 336, 338 (Tex.Crim.App. 1976)], a right to counsel at all probation revocation hearings [Ex parte Shivers , 501 S.W.2d 898, 899 (Tex.Crim.App. 1973); Richardson v. State, 487 S.W.2d 719, 721 (Tex.Crim.App. 1972); Crawford v. State, 435 S.W.2d 148, 149 (Tex.Crim.App. 1965)], and a right to speedy trial [Carney v. State, supra at 26].

A careful reading of both Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, indicate that the Texas Court of Criminal Appeals is correct in deciding that the preliminary hearing requirement of Gagnon v. Scarpelli is not necessary to Texas probation revocation laws because those laws fully provide due process standards. In Morrissey v. Brewer this Court supports the Texas court's decision:

> (Due process's) flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure. Supra at 481.

This Court in Morrissey v. Brewer, supra establishes a due process structure for probation revocation proceedings, but notes the type of process considered:

> There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether

parole should be revoked. Supra at 485. (Our underlining).

The Morrissey "typical" process of parole revocation does not conform with the formal, twenty days Texas probation revocation process. In Gagnon v. Scarpelli, supra, this Court applied the Morrissey v. Brewer parole procedures to probation revocation cases. But again, this Court focused on a probation revocation procedure entirely different from the Texas procedure.

> In short, a criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented, not by a prosecutor, but by a parole officer with the orientation described above; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.

Gagnon v. Scarpelli, supra at 789.

Further, the Texas probation revocation procedures comply with the due process considerations established in Morrissey v. Brewer, supra and Gagnon v. Scarpelli, supra. The Morrisey v. Brewer minimum requirements of due process, supra at 489, as applied through Gagnon v. Scarpelli, supra at 786 were:

> "(a) written notice of the claimed violations of [probation or] parole; (b) disclosure to the [probation or] parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking [probation or] parole."

Texas revocation proceedings fulfill each requirement.

Although Texas does not have an established preliminary hearing procedure to determine probable cause of a probation

violation, that the art. 42.12(8)(a), V.A.C.C.P., requirement, upon motion of a defendant in jail, that a revocation hearing be conducted within twenty days fulfills the spirit of the Morrissey v. Brewer preliminary hearing stage. This Court's preliminary hearing considerations were that the hearing be conducted while "information is fresh and sources are available." Supra at 485. The twenty day hearing provision clearly fulfills those requirements.

In light of the fact that the Texas probation revocation procedure is essentially conducted as a criminal trial, that the Texas Court of Criminal Appeals has consistently provided constitutional safeguards to probationers at their revocation hearing, that a careful reading of Morrissey v Brewer, supra, and Gagnon v. Scarpelli, supra, indicates this Court was not addressing Texas-type procedure, and that the Texas probation revocation provision complies with the due process standards of Morrissey v. Brewer, supra, and Gagnon v. Scarpelli, supra, the Texas Court of Criminal Appeals correctly upheld Vincent's probation revocation.

CONCLUSION

For the reasons stated, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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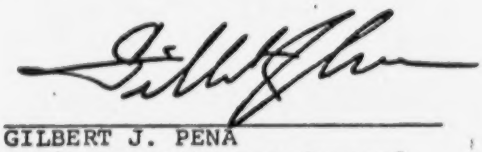
ATTORNEYS FOR RESPONDENT

PROOF OF SERVICE

I, Gilbert J. Pena, Assistant Attorney General of Texas, hereby certify that a copy of the above Motion Appellee State of Texas to Dismiss or Affirm has been served by placing same in the United States mail, postage prepaid, certified, on this the 25th day of March, 1980, addressed to:

Mr. Robert D. McCutcheon
P.O. Box 1066
Perryton, Texas 79070



GILBERT J. PENA
Assistant Attorney General

E X H I B I T "A"

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of Criminal Appeals of Texas, do hereby certify that in Cause No. 60,564 styled:

DANNY VINCENT, Appellant

VS.

THE STATE OF TEXAS, Appellee

the judgment of the 84th Judicial District Court of Ochiltree County, Texas was affirmed on September 19, 1979, on October 10, 1979 the appellant's motion for rehearing en banc was denied and on October 12, 1979 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN BANC this cause was disposed of by this Court on October 10, 1979, the appellant having exhausted all remedies in this, The Court of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

I further certify that the Texas Court of Criminal Appeals is possessed of the full record in this case, including both the trial record and appellate record.

I further certify that I have reviewed the Texas Court of Criminal Appeal's docket entries and all documents filed with said court by Danny Vincent and I do not find that Appellant Vincent has filed a Notice of Appeal to the United States Supreme Court with the Texas Court of Criminal Appeals.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 25th day of MARCH A.D. 1979.

Thomas Lowe

THOMAS LOWE, Clerk of the
COURT OF CRIMINAL APPEALS
OF TEXAS

Supreme Court, U. S.
FILED
OCT 20 1980
MICHAEL RODAK, JR., CLERK

NO. 79-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANNY VINCENT,

Appellant

V.

STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court of Criminal Appeals

MOTION TO DISMISS

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Ex parte Trillo, 540 S.W.2d 555 (Tex. Crim. App. 1976) 4

Statutes

art. 42.12, Tex. Code Crim. Proc. 2

art. 44.09, Tex. Code Crim. Proc. 3,4

NO. 79-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANNY VINCENT,

Appellant

V.

STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court of Criminal Appeals

MOTION TO DISMISS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The State of Texas, Appellee herein, moves this Court to dismiss the case of *Danny Vincent v. State of Texas*, Cause No. 79-5962. Appellant Vincent violated Tex. Code Crim. Proc. art. 44.09, and, as a result, the Texas Court of Criminal Appeals lost jurisdiction of the case before it was decided. Consequently, Appellee would show that this Court does not have jurisdiction of Appellant Vincent's case. In support thereof, Appellee would submit the following:

FACTS

I.

Appellant Vincent challenges the constitutionality of Tex. Code Crim. Proc. Ann. art. 42.12 probation revocation procedures by way of a direct appeal from a decision of the Texas Court of Criminal Appeals. Following the submission of Appellant's jurisdictional statement and the Appellee's motion to dismiss or affirm, this Court directed that the case should be granted review. The briefs of both Appellant and Appellee have been submitted to the Court and oral argument has been scheduled for the fall session on November 5, 1980.

II.

On August 11, 1980, appellee was first informed that the appellant, Danny Vincent, escaped from custody during the pendency of his appeal to the Texas Court of Criminal Appeals. See Appellee's Exhibit "A". Appellant was sentenced on July 11, 1978, to serve six years in the Texas Department of Corrections. As stated in the Brief for Appellee, p. 7, the appellant was granted an appeal bond which was increased from $2,000.00 to $12,000.00 on August 2, 1978.

Appellant Vincent thereafter violated his bond agreement and left the State of Texas. He was arrested in the State of Colorado for a felony offense of forgery and placed on probation on February 20, 1979. On July 25, 1979, the Colorado probation was revoked and Appellant immediately began serving his five year sentence at the Colorado State Reformitory at Buena Vista. See Appellee's Exhibit "B".

ARGUMENT AND AUTHORITIES

I.

Under Texas law, the Texas Court of Criminal

Appeals lost jurisdiction of the appellant's case at the time of Vincent's escape from custody. Because that decision was void, this Court should not now review it.

The relevant portion of the applicable statute, Tex. Code Crim. Proc. art. 44.09, reads:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the Court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; . . .

This Court has specifically affirmed the constitutionality of Tex. Code Crim. Proc. art. 44.09 in *Estelle v. Dorrough*, 420 U.S. 534 (1975). In that case, the Court noted, "since the statute provides that jurisdiction shall 'no longer attach' upon escape, the escape itself divests the court jurisdiction with later dismissal being a mere formality." *Estelle v. Dorrough, supra* at 535 n. 1; citing *Lafferty v. State*, 60 S.W.2d 222 (1933); *ex parte Gurley*, 286 S.W. 222 (1926). When notified that an appellant has escaped, the Texas Court of Criminal Appeals has consistently dismissed cases which fall within the purview of this statute. *Ex parte Reid*, 581 S.W.2d 686 (Tex.Crim.App. 1979); *ex parte Leopard*, 520 S.W.2d 759 (Tex. Crim. App. 1975); *Holliday v. State*, 482 S.W.2d 215 (Tex. Crim. App. 1972); *Ballage v. State*, 459 S.W.2d 823 (Tex. Crim. App. 1970); *Rodriguez v. State*, 457 S.W.2d 555 (Tex. Crim. App. 1970); *Fonesca v. State*, 455 S.W.2d 244 (Tex. Crim. App. 1970).

II.

Under Texas law, Appellant Vincent was "in custody"

pursuant to his appeal bond. *See Ex parte Trillo*, 540 S.W.2d 555 (Tex. Crim. App. 1976); *see also, Moreno v. State*, 544 S.W.2d 398 (Tex. Crim. App. 1976); *Copeland v. State*, 240 S.W.2d 779 (Tex. Crim. App. 1951). Vincent escaped from custody and thereby subjected himself to the dismissal required by Tex. Code Crim. Proc. art. 44.09. The Texas Court of Criminal Appeals, however, was not notified of this fact; thus, the Texas court did not dismiss Vincent's case.

III.

Unless a federal question is raised and decided in the state court below, this Court has no jurisdiction over the case. *Cardinale v. Louisiana*, 394 U.S. 437 (1969); *see Tacon v. Arizona*, 410 U.S. 351 (1973); *Moore v. Illinois*, 408 U.S. 786 (1972); *Hill v. California*, 401 U.S. 797 (1970). The Court has recognized that each state has a right to prescribe rules to be applied when a litigant attempts to invoke the jurisdiction of its appellate courts. *Beck v. Washington*, 369 U.S. 541 (1962); *see Michigan v. Tyler*, 436 U.S. 499, 512 n. 7 (1978). A litigant's failure to follow the established appellate channels precludes his right to Supreme Court review of the state actions. *Herndon v. Georgia*, 295 U.S. 441 (1935).

IV.

Texas law requires that a criminal appellant remain in custody during the pendency of his appeal. Tex. Code Crim. Proc. art. 44.09. Appellant Vincent violated this requirement, thereby automatically divesting the Texas Court of Criminal Appeals of jurisdiction over his case. Appellee State of Texas submits that this Court should not now take an appeal from a state court decision which is void for lack of jurisdiction.

V.

The policies of this Court which call for the dismissal

of a case when a litigant escapes pending his Supreme Court appeal underscore the rationale of the Texas law.

> No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call on the resources of the Court for determination of his claims.

Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). The facts outlined in this motion place the case in the same posture as *Molinaro v. New Jersey*. Appellee State of Texas respectfully requests that this Court decline to adjudicate Appellant Danny Vincent's case and immediately strike the case from the Court's docket. *Smith v. United States*, 94 U.S. 97 (1876); *Bonahan v. Nebraska*, 125 U.S. 692 (1887).

WHEREFORE, PREMISES CONSIDERED, Appellee State of Texas respectfully requests that this Court dismiss Appellant Danny Vincent's appeal for lack of jurisdiction or, in the alternative, that the Court decline to adjudicate the appellant's case because of his escape.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

W. BARTON BOLING
Assistant Attorney General
Chief, Enforcement Division

DAWN BRUNER
Assistant Attorney General

DOUGLAS M. BECKER
Assistant Attorney General
Counsel of Record

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3281

Attorneys for Appellee

APPELLEE'S EXHIBIT "A"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF OCHILTREE
STATE OF TEXAS
Criminal Action no. 1494

In RE: the case of:	*	
	*	
THE STATE OF TEXAS	*	
Plaintiff	*	MOTION FOR
vs.	*	CONCURRENT
	*	SENTENCE
DANNY VINCENT	*	
	*	
Defendant	*	

COMES NOW, the Defendant, Danny Vincent, pro se, and requests this Honorable Court to hear and consider this Motion, and gives as grounds therein the following:

1. That the Defendant was sentenced on the 23rd day of May, 1977, to a term of six (6) years in the State Penitentiary at Huntsville, for the crime of Burglary of a Habitation.

2. That the Defendant was released upon Appeal Bond on the 10th day of July, 1978, after his probation in the aforementioned case was revoked for Drinking Under the Influence of Alcohol.

3. That the Defendant absconded his Appeal Bond, and did flee to the State of Colorado.

4. That the Defendant was arrested in said State of Colorado on or about the 5th day of December, 1978, and has since been found guilty of the crime of Forgery in the second degree, and has been incarcerated in the Colorado Department of Corrections since on or about the 28th day of July, 1979.

5. That the Defendant is currently incarcerated in

the Buena Vista Correctional Facility, in Buena Vista Colorado, and the fact that he is still wanted in the State of Texas, and the fact he must return to the State of Texas upon release from said Colorado Department of Corrections brings him grief and mental anguish.

6. That the Defendant wishes to resolve his term in said State of Texas, and to reach a disposition with a conclusion of both his said terms to be served concurrently in the State of Colorado Department of Corrections.

7. That the Defendant is currently involved in Vocational and Therapy Counseling groups so that he might acquire a useful trade that might serve him upon release from the Department of Corrections, and to gain an insight into the problems that have led to his past criminal activities and current incarceration, respectively.

8. That the Defendant is currently enrolled in the Buena Vista Correctional Facility Vocational Electronics class, and is currently receiveing [sic] excellent work ratings and progress reports.

9. That the Defendant has an alcohol problem, and is attending Alcoholics Anonymous to learn to understand, cope, and overcome his alcohol problem.

10. That the Defendant is scheduled for sessions with Dr. Karl Waggoner, Psychiatrist at the Buena Vista Correctional Facility, so that he might learn to identify, understand, copy and rectify the attitudes and behavior that led to his incarceration, and past criminal activity.

11. That the Defendant is currently showing a genuine desire to reform, and to learn to be, and upon release be, a useful, productive citizen of Society.

12. That the Defendant believes the extended time currently awaiting him in the State of Texas will be

caustic and detrimental to his current positive behavior in that extended time will only further expose him to a criminal element that would be impossible to ignore under the circumstances of extended incarceration.

13. That the Defendant believes that his behaviour [sic] and revision of attitudes since hin [sic] incarceration in the Colorado Department of Corrections merits a critical, impartial, and positive consideration by this Honorable Court upon reciept [sic] of this Motion.

That the Defendant believes, and has faith in, the State of Texas fairness and Justification in Ordering his incarceration, and believes that the said State of Texas will favorably consider this Motion,

15. Further, Defendant sayeth not.

WHEREFORE, it is respectfully requested that this Honorable Court find cause and give Order pertaining to the Defendants term in the State of Texas to be served concurrently with the term now being served by the Defendant in the Colorado Department of Corrections so that Justice will be duly served, and the cause of Rehabilitation fully done.

Wherefore this Motion is Respectfully Submitted to this Honorable Court in the hope and faith that it will receive impartial and positive consideration.

/s/
Danny Vincent
Box 'R'
Buena Vista Co.
81211

STATE OF COLORADO

COUNTY OF CHAFFEE

Subscribed and Sworn to before me this _____ day of November, 1979.

My Commission expires _____

_____

Notary Public

APPELLEE'S EXHIBIT "B"

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF JEFFERSON
STATE OF COLORADO
Case No. 79CR0009 Division 7

PEOPLE OF THE STATE OF COLORADO	*	JUDGMENT OF CONVICTION, SENTENCE AND MITTIMUS
vs.	*	
DANNY DUANE VINCENT, Defendant	*	

PEOPLE OF THE STATE OF COLORADO to the Sheriff of Jefferson County, and Superintendent of the Colorado State Diagnostic Unit at Canon City, Colorado.

ON this day, Danny Duane Vincent, the Defendant herein, being personally present in Court, and being represented by Laurin Garner, Attorney at Law, and the Defendant having been arraigned in this Court upon an ~~*Indictment,~~ *Information, previously filed herein, to which the Defendant entered a plea of *Guilty, ~~*Not Guilty, *Nolo Contendere,~~ and after having been found Guilty by ~~*a verdict of the jury,~~ *by the Court, of the offense(s) of:**

Second Degree Forgery, 1973 CRS 18-5-103, as amended (Class IV Felony),

**INDICATE STATUTORY SECTION, SUB-SECTION, AND CLASS AFTER EACH COUNT

and the Court having afforded the Defendant an opportunity to make a statement on his/her behalf, and to present any information in mitigation of punishment, and the People having been given an opportunity to be heard on any matter material to the imposition of sentence:

NOW, THEREFORE, the Court being fully advised in the premises, it is the Judgment and Sentence of the

Court that the Defendant be sentenced to imprisonment at the *Colorado State Reformatory at Buena Vista, Colorado, *_____ ~~County Jail at~~ _____ Colorado, for *a term of not less than two years, nor more than five years, ~~*for an indeterminate term not to exceed~~ _____**

(Defendant was placed on probation on February 20, 1979. On July 25, 1979, Defendant admitted he violated the terms and conditions of probation and probation was revoked.)

**TYPE WHEN APPROPRIATE WHETHER EACH COUNT IS TO RUN CONCURRENTLY OR CONSECUTIVELY

~~and *a fine of~~ _____ ~~and *costs in the amount of~~ $_____

THIS SENTENCE is imposed after giving full consideration for _____ presentence confinement which the Defendant has undergone with respect to the transaction for which he/she is being sentenced, and the Sentence imposed reflects that credit *was,* was not given for such confinement.

IT IS FURTHER ORDERED: That Defendant be given credit for 79 days' pre-sentence confinement against both the minimum and maximum sentence.

(PRE-SENTENCE REPORTS ATTACHED)

THEREFORE, IT IS ORDERED that the Sheriff of Jefferson County, shall convey the Defendant to the *Colorado State Diagnostic Unit at Canon City, Colorado, ~~*the~~ _____ ~~County Jail at~~ _____ ~~Colorado,~~ and safely deliver him/her to the Superintendent of said institution to be received and kept as provided by law.

Done in open court this 25th day of July, 1979 at Golden, Colorado

By the Court:

/s/

District Judge (Joseph P. Lewis

Entered into the register of actions of the Court this 25th day of July, 1979.

JANET M. SCHERF
Clerk of the Court

/s/

By _____
Deputy Clerk

*Strike as to form

Sheriff's Return

I hereby certify that on the _____ day of _____, 19_____, I duly executed the within Order by delivering to _____ Superintendent of the _____ at _____ , Colorado, the person of _____ , the within named defendant pursuant to said Order.

FEES: Service $ _____
Mileage $_____
Return $ _____
Total $ _____

_____
Sheriff

By: _____
Deputy

Receipt by State Institution

I hereby certify that on the _____ day of _____, 19 _____, the Sheriff of _____ County, delivered into my custody ofr imprisonment at the Colorado State _____ at _____ , Colorado, the person of _____, the Defendant ordered and sentenced and confined herein.

/s/ Lou Hesse, Director
Diagnostic Center

By: /s/
Dallas H. Dunn, Records
Supervisor

Endorsement of Confinement Pending Appeal

I hereby certify that _____, the Defendant herein ordered confined at the _____ County Jail, was received on the _____ day of _____, 19_____, and was released on the _____ day of _____, 19 _____ to the custody of _____.

_____ _____
Sheriff

By: _____
Deputy

Receipt by County Jail

I hereby certify that _____, the Defendant herein ordered vonfined to the _____ County Jail, was received on the _____ day of _____, 19 _____.

_____
Sheriff

By: _____
Deputy

APPELLANT'S MEMORANDUM
IN OPPOSITION TO
APPELLEE'S MOTION TO DISMISS

RECEIVED
OCT 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-5962

DANNY VINCENT,

Appellant,

VS.

STATE OF TEXAS,

Appellee.

On Appeal From the Texas
Court of Criminal Appeals

LEMON, CLOSE, ATKINSON
SHEARER & McCUTCHEON
Robert D. McCutcheon
P.O. Box 1065
Perryton, Texas 79070

PRELIMINARY STATEMENT

Appellee, The State of Texas ("The State"), has filed its Motion to Dismiss this appeal on the grounds that Appellant, Danny Vincent ("Vincent"), "escaped from custody" during the pendency of his appeal to the Texas Court of Criminal Appeals, thereby resulting in loss of jurisdiction by the Texas Court of Criminal Appeals. The Motion to Dismiss should be overruled for the simple reason that Vincent did not "escape from custody" during the pendency of his appeal. Tex. Code Crim. Proc. art. 44.09 is therefore not applicable, and the Texas Court of Criminal Appeals did not lose jurisdiction.

The sole factual basis upon which the State of Texas relies for its factual assertion that the Defendant "escaped from custody" is the statement in a pro se "Motion for Concurrent Sentence" filed by Vincent in the state trial court without the benefit of counsel to this appeal.[1/]

As shown by the Affidavit of Sherill McLearen,[2/] agent for the appeal bondsman, Vincent left the State of Texas with the bondsman's knowledge, understanding and consent. Likewise, the prosecuting attorney and the local sheriff knew of Vincent's leaving at the time he left and consented. In fact, this was a condition of the issuance of the appeal bond. Consequently, the State's house of cards falls on the inaccuracy of its factual premise.

ARGUMENT AND AUTHORITIES

The State's entire argument is grounded upon the alleged fact that Vincent made an "escape from custody" within the meaning of Tex. Code Crim. Proc. art. 44.09. Absent an "escape from custody," the State's motion must necessarily fail.

1/ The affidavit of Robert D. McCutcheon attached hereto as Exhibit "A" reflects that he, as Vincent's Texas counsel, was not apprised of the filing until he received a copy of the notice from Vincent contemporaneously with Vincent's filing thereof.

2/ Attached hereto as Exhibit "B".

Essential to escape is the "unauthorized" regaining of a person's liberty from the authority and control of the power entitled to restrain him. Although not defined in the Texas Code of Criminal Procedure, the term "escape" is defined in the Texas Penal Code as:

> . . .unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole. Tex. Penal Code § 38.01(3).

"Custody" is defined as being:

> . . .detained or under arrest by a peace officer or under restraint by a public servant pursuant to an order of a court. Tex. Penal Code § 38.01(2).

Clearly, Vincent was not in "custody" as defined by the Texas Penal Code. In fact, he was free from custody and under the control of the bondsman while his appeal was pending. Vincent was not:

(a) detained or under arrest by a peace officer; or,

(b) under restraint by a public servant.[3/]

Even if, by some stretch of the imagination, a bail bondsman could be considered a "public servant," Vincent's departure for Colorado was authorized, not unauthorized.

Clearly, the State's reliance upon the proposition that Vincent was "in custody" pursuant to his appeal bond is misplaced. The case of Ex Parte Trillo, 540 SW2d 728 (Tex. Crim. App. 1976) as cited by the State, involved the determination of whether an appellant was being restrained and therefore "in custody" even though he was free on personal bond for purposes of a habeas corpus challenge to confinement beyond the twenty day period allowed for filing of the motion to revoke probation. Citing Ex Parte Burt, 499 SW29 109 (Tex. Crim. App. 1973), the Texas court in Ex Parte Trillo held that the petitioner, even though he had been released from confinement from the Texas Department of Corrections, would be considered "in custody" since there was a possibility that collateral

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3/ "Peace Officer" and "Public Servant" are statutorily-defined terms. See Exhibit "C" attached hereto.

legal consequences would be imposed on the basis of the challenged conviction. The Texas court followed the holdings of this Court in Hensley v Municipal Court, 411 U.S. 345 (1973), which was grounded on the premises that such restraints on liberty were severe and immediate enough for purposes of federal habeas corpus challenge. The actual holding of Trillo was to insure that a party released on bail was not deprived of the habeas corpus remedy. The decision was also made, in part, on Tex. Code Crim. Proc. art. 11.04 which provides that every "provision relating to the writ of habeas corpus shall be most amply construed in order to give effect to the remedy and protect the rights of the person seeking relief under it."

The second case cited by the State, Moreno v State, 544 SW2d 398 (Tex. Crim. App. 1976), stands for the proposition that a mistaken release from custody puts the appellant, who had voluntarily absented himself and whose whereabouts are unknown, in the same status as an escapee, thus depriving the Court of Criminal Appeals from jurisdiction to entertain his appeal. In Copeland v State, 240 SW2d 779 (Tex. Crim. App. 1951), the appellant had given notice of appeal, but he also had failed to give recognizance and had escaped from the custody of the sheriff.

Clearly, Vincent's bondsman had the right to permit Vincent to travel to Colorado. This is especially true where the local sheriff and the State's attorney consented. The risk was on the bondsman if Vincent later "escaped" or fled. To the contrary, however, Vincent notified the bondsman of his intended place of residence. Vincent requested permission in advance to go to Colorado. None of Vincent's actions are consistent with an "escape".

Other than Vincent's pro se motion, there is nothing in the record to indicate an escape. Tex. Code Crim.Proc. art. 44.10 provides that when any such escape occurs, "the sheriff who had the prisoner in custody, shall immediately report the fact under oath to the district or county attorney in which

the conviction was had." Such report "shall be sufficient evidence of the fact of such escape to authorize the dismissal of the appeal." No such affidavit appears.[4/]

Tex. Code Crim. Proc. art. 17.16 gives a surety on a bail bond the right, at any time, to relieve itself of his undertaking ". . .by surrendering the accused into the custody of the sheriff of the county where he is prosecuted." Tex. Code Crim.Proc. art. 17.19 provides that "any surety, desiring to surrender his principal, may, upon making affidavit of such intention before the court or magistrate before which the prosecution is pending, or would obtain from such court or magistrate a warrant of arrest for such principal, which shall be executed as in other cases." No proceedings have been filed to surrender Vincent or to relieve the principal of his obligation on the appeal bond.[5/]

The State's reliance upon Vincent's pro se motion is regretful. As this Court has stated, allegations of pro se motions are held to less stringent standards than formal pleadings drafted by lawyers. Haines v. Kerner, 404 U.S. 519 (1972).

In order to support a conviction for escape from jail, the State must "prove that the defendant was formally charged and in custody." Rodriguez v State, 457 SW2d 555 (Tex. Crim. App. 1970). The State's burden of proof in seeking to dismiss this appeal should not be less considering the draconian effect upon the status of Vincent's appeal.

Finally, the State requests that the case be dismissed because Vincent escaped "pending his Supreme Court appeal". Once again, the State assumes, without proving or offering any supporting evidence, that Vincent has indeed escaped pending this appeal. Clearly, Vincent was in Colorado with permission of the bondsman. The unfortunate circumstance of his being

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4/ See, Exhibit "D" attached hereto.

5/ See, Exhibit "D" attached hereto.

convicted for a subsequent crime in Colorado does not elevate authorized travel to escape. All of the cases cited by the State deal with an appellant escaping pending review by this Court. Vincent's travel to Colorado occurred prior to the institution of the appeal to this Court. As the court stated in Molinaro v New Jersey, 396 U.S. 365 (1970):

> His bail has been revoked and the State considers him a fugitive from justice.

There is nothing is this record, nor can the State cite anything in this record, by which the State considers, or could properly consider, Vincent to be an escapee or a fugitive from justice. In fact, the State consented to his leaving at the time.

Consequently, the State's effort to dismiss Vincent's appeal should fail. There was no "escape." There was no "custody." The Texas Court of Criminal Appeals did not lose jurisdiction of Vincent's appeal because of Vincent's authorized travel to Colorado with the prior knowledge and consent of Vincent's bondsman and with the knowledge and consent of the local State's attorney and sheriff.

WHEREFORE, Appellant Danny Vincent, requests that the Motion to Dismiss filed by the State of Texas be overruled in all respects.

Respectfully submitted,

LEMON, CLOSE, ATKINSON,
SHEARER & McCUTCHEON
Robert D. McCutcheon
Interstate Savings & Loan Bldg.
P.O. Box 1066
Perryton, Texas 79070
Telephone: 806-435-6544

Robert D. McCutcheon
Of Counsel

ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

A copy of the foregoing Appellant's Brief in Opposition to Appellee's Motion to Dismiss was this day placed in the U.S. Mail, postage prepaid, first class, addressed to the Honorable Douglas M. Becker and Dawn Bruner, Assistant Attorneys General of the State of Texas, Supreme Court Building, P.O. Box 12548, Austin, Texas 78711.

Dated: October 24, 1980.

Robert D. McCutcheon

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, ROBERT D. McCUTCHEON, being first duly sworn upon oath state as follows.

1. My name is ROBERT D. McCUTCHEON. I am over 18 years of age, and I reside in Perryton, Ochiltree County, Texas; I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and that they are all true and correct.

2. I am, and have been at all times material to the facts contained in this Affidavit, appellate counsel for Mr. Danny Vincent, whose appeal is now pending before the Supreme Court of the United States in Cause No. 79-5962.

3. I was not aware that Mr. Vincent had prepared or filed, until after the same was filed and I had received a copy in the mail from Mr. Vincent, that certain "Motion for Concurrent Sentence", a copy of which is attached as Exhibit "A" to the motion of the State of Texas to dismiss Vincent's appeal before the Supreme Court of the United States.

Further Affiant sayeth not.

Robert D. McCutcheon

SUBSCRIBED AND SWORN to this 24th day of October, 1980,

Notary Public, State of Texas
My Commission Expires 9-22-198_

Notary Public in and for
Ochiltree County, Texas

My commission expires:

_____

EXHIBIT "A"

AFFIDAVIT

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, SHERILL McLEAREN, being first duly sworn upon oath state as follows.

1. My name is SHERILL McLEAREN. I am over 18 years of age, and I reside in Perryton, Ochiltree County, Texas; I have never been convicted of a felony, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and that they are all true and correct.

2. On July 25, 1978, I was the local agent for Mr. Ben Stokes, who issued a $12,000.00 Appeal Bond for Mr. Danny Vincent in Cause No. 1494 in the District Court in and for Ochiltree County, Texas, in the matter of the State of Texas vs. Danny Vincent, on a probation revocation appeal.

3. At the time of the issuance of said bond, Mr. Vincent and I discussed the matter of his leaving for the State of Colorado to live with a brother of his. Also, this was discussed with the Ochiltree County Sheriff and with Mr. Bill Rivers, County Attorney for Ochiltree County, Texas. The appeal bond was issued on the condition that Mr. Vincent's parents pay the bond premium and that Mr. Vincent leave Texas and go to Colorado to live with his brother. The Sheriff and Mr. Rivers agreed to this arrangement. On behalf of the bondsman, I gave him permission to go to Colorado and so notified my office. I indicated to my office on that date that Mr. Vincent would be reporting to the Borger, Texas office since he would be out of state.

4. My records reflect that Mr. Vincent left the State of Texas on August 14, 1978. My records also reflect that he left a forwarding address of 9850 North Ted Blvd., Federal Heights, Colorado, where he could be located.

5. Mr. Vincent's leaving the State of Texas and going to the State of Colorado was with the full knowledge, understanding and consent of the bondsman who had issued his Appeal Bond in the referenced case.

Further Affiant sayeth not.

Sherill McLearen
Sherill McLearen

SUBSCRIBED AND SWORN to this 24th day of October, 1980,

BETTYE WEBB
Notary Public, State of Texas
My Commission Expires 9-22-1981

Bettye Webb
Notary Public in and for
Ochiltree County, Texas

My commission expires:

_____

EXHIBIT "B"

EXHIBIT "C"

Tex. Penal Code art. 1.07:

(25) "Peace officer" means a person so designated by the Code of Criminal Procedure, 1965.

Tex. Penal Code art. 1.07:

(30) "Public servant" means a person elected, selected, appointed, employed, or otherwise designated as one of the following, even if he has not yet qualified for office or assumed his duties:

(A) an officer, employee, or agent of government;

(B) a juror or grand juror; or

(C) an arbitrator, referee, or other person who is authorized by law or private written agreement to hear or determine a cause or controversy; or

(D) an attorney at law or notary public when participating in the performance of a governmental function; or

(E) a candidate for nomination or election to public office; or

(F) a person who is performing a governmental function under a claim of right although he is not legally qualified to do so.

Tex. Code Crim. Proc. art. 2.12:

The following are peace officers:

(1) sheriffs and their deputies;

(2) constables and deputy constables;

(3) marshals or police officers of an incorporated city, town, or village;

(4) rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety;

(5) investigators of the district attorneys', criminal district attorneys', and county attorneys' offices;

(6) law enforcement agents of the Alcoholic Beverage Commission;

(7) each member of an arson investigating unit of a city, county or the state;

(8) any private person specially appointed to execute criminal process;

(9) officers commissioned by the governing board of any state institution of higher education, public junior college or the Texas State Technical Institute;

(10) officers commissioned by the Board of Control;

(11) law enforcement officers commissioned by the Parks and Wildlife Commission;

(12) airport security personnel commissioned as peace officers by the governing body of any political subdivision of this state that operates an airport served by a Civil Aeronautics Board certificated air carrier;

(13) municipal park and recreational patrolmen and security officers; and

(14) security officers commissioned as peace officers by the State Treasurer.

THE STATE OF TEXAS §

COUNTY OF OCHILTREE §

I, WILMA SROF, hereby certify the following:

1. I am the duly elected Clerk of the District Court in and for the County of Ochiltree, State of Texas, and as such Clerk, have custody of the records in Cause No. 1494, The State of Texas vs. Danny Vincent.

2. There is no pleading, document, instrument or letter in the record relating to revocation of Mr. Vincent's appeal bond, nor any proceedings by which the appeal bondsman sought to obtain a warrant for the attachment of Mr. Vincent to bring him before the court.

3. There is no affidavit by the Sheriff of Ochiltree County, or any other person, relating in any manner to any alleged escape by Mr. Vincent from the State of Texas, to the State of Colorado or any other place.

Respectfully submitted,

Wilma Srof

Wilma Srof, Clerk of the
District Court

EXHIBIT "D"

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

No. 79-5962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

DANNY VINCENT, *Appellant,*

v.

STATE OF TEXAS, *Appellee.*

On Appeal From The Texas Court Of Criminal Appeals

BRIEF FOR APPELLANT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the State of Texas deprived Appellant of his liberty without due process of law when it revoked Appellant's probation pursuant to TEX. CRIM. PROC. CODE, Art. 42.12(8) (Vernon) without a preliminary hearing to determine probable cause for probation revocation as mandated by *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973).

2. Whether this appeal is "in time" under *U.S. Sup. Ct. Rule* 11 where Appellant's Notice of Appeal was not filed with the Texas Court of Criminal Appeals, but was filed with the District Court within the time allowed.

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BRIEF FOR APPELLANT

THE OPINION BELOW

The per curiam decision of the Texas Court of Criminal Appeals is unpublished [586 S.W.2d 880 (Tex.Crim.App. 1979)] and is found at J.A. 38. No other written opinions have been delivered.

JURISDICTION

The decision of the Texas Court of Criminal Appeals was entered September 19, 1979. Appellant timely filed a Motion for Rehearing En Banc in the Texas Court of Criminal Appeals on September 26, 1979. Vincent's Motion for Rehearing was denied October 10, 1979. The Notice of Appeal was filed in a Court possessed of the record [the 84th District Court of Ochiltree County, Texas] on January 4, 1980. As a precautionary measure, notice was purportedly mailed to the Texas Court of Criminal Appeals on January 4, 1980, but apparently was never received by that Court. The jurisdiction of this Court is invoked pursuant to 18 *U.S.C.* § 1253 (2) (1966)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

U.S. CONST. amend. XIV, § 1:

> . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law. . .

The Statute in Question

TEX.CRIM.PROC.CODE ANN., Art. 42.12(8) (a) (Vernon):

> Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation

of any of the condition of the probation and cause the defendant to be arrested. Any probation officer, police officer or other officer with power to arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The state may amend the motion to revoke probation any time up to seven days before the date of the revocation hearing, after which time the motion may not be amended except for good cause shown and in no event may the state amend the motion after the commencement of taking evidence at the hearing. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

Other Statutes Involved

TEX.CRIM.PROC.CODE ANN. Art. 42.12(3)(b) (Vernon):

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a

defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Section 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show cause why his probation should not be revoked; and if such a defendant requests such a right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set fourth in said Sec. 8 of this Article shall be followed.

TEX.CRIM.PROC.CODE ANN. Art. 26.04(b) (Vernon):

(b) The appointed counsel is entitled to ten days to prepare for trial, but may waive the time by written notice, signed by the counsel and the accused.

TEX.CRIM.PROC.CODE ANN. Art. 40.09(1) (Vernon):

1. *Record in Appeals to the Court of Criminal Appeals.*

In all cases appealable by law to the Court of Criminal Appeals, the clerk of the court that entered the conviction sought to be appealed from shall, under his hand and seal of the court, make and prepare an appellate record comprising a true copy of the matter designated by the parties, but shall always include, whether designated or not, copies of the material pleadings, material docket entries made by the court, the charge, verdict, judgment, sentence, notice of appeal, any appeal bond, all written motions and pleas and orders of the court, and bills of exception. The matter so prepared shall be assembled under one cover and shall constitute the record on appeal. The pages of

this record shall be numbered consecutively and there shall be an index prepared by the clerk showing the location of each document in the record. The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

STATEMENT OF THE CASE

On May 23,1977, Appellant, Danny Vincent ("Vincent"), pled guilty to a charge of burglary in the District Court, Ochiltree County, Texas (the "Trial Court"). (J.A. 3). The Trial Court fined Vincent, sentenced him to six years in the Texas Department of Corrections, suspended imposition of Vincent's prison sentence and attached as two of the conditions of his probation that he commit no offense against the laws of Texas and refrain from drinking intoxicants. (J.A. 3-11).

On February 6, 1978, Vincent was arrested on the State's Supplementary Motion for Warrant to Revoke Probation which alleged, among other things, that Vincent had been driving while intoxicated and had not refrained absolutely from drinking intoxicants. (J.A. 16-22). On February 6, 1978, the Trial Court set March 27, 1978 as the date for hearing the State's motion to revoke on the merits. (J.A. 23). Vincent received notice of the hearing on March 2, 1978. (J.A. 25). On March 24, 1978, counsel was appointed for Vincent. The Texas Statutory Authority for revocation of probation is TEX.CRIM.PROC.CODE Art. 42.12(8)(a) (Vernon) ("The Texas Statute").

On March 27, 1978, Vincent objected to the proceedings on the following grounds, among others:

> 1. Failure to grant Vincent the right to a preliminary hearing, as promptly as convenient after arrest, and notice thereof, to determine probable cause for believing that the probation conditions had been violated under *Gagnon* v. *Scarpelli,* 411 U.S. 778 (1973) and *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).
>
> 2. Revocation of probation without a preliminary hearing was expressly prohibited by the due process clause of the Fourteenth Amendment to the United States Constitution.
>
> 3. The Texas Statute was unconstitutional on its face, and as applied to him, for failing to provide for the preliminary hearing and attendant safeguards mandated under the Fourteenth Amendement to the United States Constitution, as interpreted by *Gagnon* v. Scarpelli, 411 U.S. 778 (1973) and *Morrissey* v. *Brewer,* 408 U.S. 471 (1972).

The Trial Court overruled each of these objections.

On April 10, 1978, the Trial Court found Vincent to have violated his probation conditions, revoked his probation and sentenced him to not less than 2 nor more than 6 years in the Texas Department of Corrections. (J.A. 32). Asserting the objections detailed above, Vincent timely appealed to the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals affirmed the Trial Court's judgment. The per curiam decision states, in part:

> Both grouds complained of the failure of the Texas system of probation to provide a preliminary hearing of the kind discussed in *Scarpelli* . . . This argument was rejected in *Whisenant v. State*, 557 S.W.2d 203, and it does not require further discussion today. (J.A.38).

SUMMARY OF ARGUMENT

1. Texas revoked Vincent's probation without affording him a preliminary hearing to determine probable cause for the alleged probation violations. Applying *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) to probation revocations, *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1972) required a two-step procedure in probation revocation to comport with fundamental notions of due process. The initial step—the probable cause hearing—is not only ignored by Texas statutes, but also is dismissed by the Texas Court of Criminal Appeals as being inapplicable to that process which Texas perceives to be due. The Texas scheme for probation revocation can, and in Vincent's case did, result in substantial deprivation of liberty by reason of the very evil *Morrissey and Scarpelli*, sought to end; *i.e.*, prolonged incarceration with no determination of probable cause. Because Texas is required to provide a speedy hearing only upon an incarcerated probationer's motion (which, if not asserted, is waived); because bail is discretionary in probation revocation proceedings; and because counsel need not be

appointed until ten days prior to the hearing on the merits, the probability of prolonged incarceration without an independent determination of probable cause is very real.

2. In respect of the proper filing of Vincent's Notice of Appeal, *U.S. Sup. Ct. Rule* 11, 28 *U.S.C.* requires only that the Notice of Appeal be filed "with the clerk of the court possessed of the record" within ninety (90) days after the entry of the final judgement from which the appeal is taken. Vincent's Notice of Appeal was timely filed with the Texas trial court which had the responsibility for preparing the state appellate record, which maintained a copy in its office, and which possessed a record of the proceedings. Although the Notice of Appeal could also have been filed with the Texas Court of Criminal Appeals (an unsuccessful attempt to do so was apparently made), this appeal should not be dismissed on that ground alone.

ARGUMENT

Proposition I

The Texas Statute is unconstitutional on its face, and as applied to Vincent, where it fails to require a preliminary hearing to determine probable cause that the conditions of probation have been violated.

By unanimous decision, this Court in *Gagnon* v. *Scarpelli*, 411 U.S. 778, 782 (1973), held that a preliminary hearing to determine if probable cause exists

to believe that the probationer has violated the terms of his probation is required after arrest and prior to a later revocation hearing, under the standards of *Morrissey* v. *Brewer*, 408 U.S. 471 (1972). In *Morrissey*, the Court found that the loss of a parolee's conditional freedom includes many of the "core values of unqualified liberty," and thus entitles the individual in jeopardy to some process, however informal, before his conditional freedom can be revoked. *Id.* at 482. Revocation is necessarily a two-step procedure if it is to comport with the requirements of due process. *Id.* at 485. The Texas Statue completely ignores the first step in the required due process procedure; *i.e.*, the requirement of a preliminary hearing to determine probable cause "at or reasonably near the place of the alleged. . . violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."*Id.* Without the preliminary hearing, the Texas statutory scheme can result in substantial infringement of that process which is due.

In the first instance, the Texas Statute makes it the duty of the probationer to request a hearing on the merits be held within 20 days of the filing of a motion to revoke probation. Even though this has been construed as a mandatory provision by the Texas Court of Criminal Appeals [*Carney* v. *State*, 573 S.W.2d 24 (Tex.Crim.App. 1978)], the burden is on the probationer to assert this right. Consequently, a speeding hearing on the merits is mandatory only if the probationer knows of this right and asserts it.

Secondly, a probationer is not entitled, as a matter of right, to bail during pendency of probation revocation proceedings. Bail is discretionary. *Ex Parte Ainsworth*, 532 S.W.2d 640 (Tex.Crim.App. 1976); *Valdez* v. *State*, 508 S.W.2d 842 (Tex.Crim.App. 1973).

Third, although counsel may be appointed upon proper application, counsel need not be appointed until ten days prior to the hearing. TEX.CRIM.PROC.CODE ANN. Arts. 42.12(3)(b) and 26.04(b).

The constitutional infirmities with such a procedure are readily apparent. The probationer can be held indefinitely (a) without the benefit of application for discretionary bail, (b) without the benefit of counsel, (c) without knowing of the evidence against him, (d) without being afforded the opportunity to examine witnesses, and (e) without the benefit of a determination that he is being held with probable cause. The only way that the probationer can secure a relatively speedy hearing, is to assert that right by motion. But the very real possibility exists that a probationer may be incarcerated for a substantial period of time without the knowledge of his right to assert the 20 day mandatory hearing time. In fact, possibility became reality for Vincent.

Vincent was imprisoned with no determination of probable cause for one and one-half months prior to his revocation hearing. The order setting the hearing date of March 27, 1978 was made on February 6, 1978. However, Vincent received no notice of that hearing until March 2, 1978. The notice of hearing provided, in

part, that Vincent had the right to be represented by an attorney of his choice at such hearing, to cross examine witnesses for the State of Texas and to offer evidence in his behalf. Consequently, Vincent was held in jail, without the benefit of counsel, for a period of one month before receiving written notice that he had the right to be represented by an attorney, to cross examine witnesses for the State of Texas and to offer evidence in this behalf. Under such circumstances, the vaunted 20-day "mandatory" hearing time under the Texas Statute provides no protection against the evils defined by *Morrissey* v. *Brewer*.

Texas' position on the non-application of *Scarpelli* to the Texas Statute represents a curious twist of constitutional reasoning. Prior to *Scarpelli*, the Texas Court of Criminal Appeals held that where a state provides for probation and revocation proceedings as part of its criminal process (even though not constitutionally required to do so), "then due process and equal protection of the law are fully applicable thereto." *Campbell* v. *State*, 456 S.W.2d 918, 921 (Tex.Crim.App. 1970). *Campbell* noted that it would "be difficult to conclude that probation revocation hearings are not criminal proceedings where substantial rights of the accused may be affected." *Id.*, citing *Mempa* v. *Rhay*, 389 U.S. 128 (1967). In post-*Scarpelli* decisions, the Texas Court of Criminal Appeals extended to probationers Fourth Amendment protection against illegal searches and seizures and Fifth Amendment protection against improperly obtained confessions. *Tamez* v. *State*, 534

S.W.2d 686 (Tex.Crim. App. 1976); *Dowdy* v. *State*, 534 S.W.2d 336 (Tex.Crim.App. 1976). The same court has even reversed orders revoking probation where there is overwhelming evidence to support such orders, when the state's pleadings were not sufficient to give the probationer "fair notice of the conduct or acts" for which the state intended to offer evidence to prove a violation of the conditions of probation. *Burkett* v. *State*, 485 S.W.2d 578 (Tex.Crim.App. 1972).

Given these Texas Court of Criminal Appeals' decisions, it might appear that Texas has protected a probationer's right to due process of law. However, these protections go only to the hearing on the merits — the second step in the *Scarpelli* due process. In a rather inconsistent series of three cases, Texas has refused to follow the *Scarpelli* mandate of a preliminary hearing. These cases have arisen because The Texas Statute does not require the preliminary hearing. An analysis of the three cases in order indicates that the Texas Court of Criminal Appeals has bootstrapped Texas law in this area based on a faulty perception of one of its own cases.

The first case was *Ex Parte Shivers*, 501 S.W.2d 898 (Tex.Crim. App. 1973). When faced with the issue of a probationer's right to counsel at a probation revocation hearing, the court in *Shivers* held that *Scarpelli* did not apply to Texas revocation proceedings. Shivers had been given life imprisonment for burglary with intent to commit theft. *Id.* at 899. Shivers petitioned for a writ of habeas corpus, contending that one of his previous convictions could not be used for the

enhancement of sentence since he had been without counsel when his probation was revoked. *Id.* The State sought to invoke *Scarpelli*, maintaining that this Court's case-by-case rule for appointment of counsel gave Shivers no absolute right to counsel at his probation revocation hearing. *Id.* at 900. Despite *Scarpelli*, the Texas Court granted relief, holding that without counsel at the hearing the previous conviction could not be used for enhancement. *Id.* at 899.

Shivers turned on the fact that probation was granted by suspending the imposition of sentence, rather than suspending the execution of sentence. The *Shivers* court reasoned that the *Scarpelli* case-by-case rule for providing counsel was limited to revocation hearings outside the criminal proceeding where the probationer had been sentenced at the original trial and only execution of the sentence was suspended. However, the Court notes that *Mempa* v. *Rhay*, 389 U.S. 128 (1967), held that counsel was required at every stage of a criminal proceeding where a defendant's substantial rights were affected. Since Texas suspends the imposition of sentence at the original trial, sentencing (a critical stage of the criminal process) takes place at the revocation. Consequently, the hearing is part of the criminal process within the ambit of *Mempa*. *Ex Parte Shivers*, *supra* at 899. Thus, the *Shivers* court held that the *Mempa per se* rule for providing counsel, not the *Scarpelli* case-by-case rule, is applicable in Texas probation revocation hearings. *Id.* at 901.

In *Grant* v. *State*, 505 S.W.2d 259 (Tex.Crim.App. 1974), the court relied on *Shivers* to hold that the

Scarpelli preliminary hearing was not required in Texas, when in fact *Shivers* did not address that portion of *Scarpelli*. Finally, relying on *Shivers* and *Grant*, the court in *Whisenant* v. *State*, 557 W.W.2d 102, 105 (Tex.Crim. App. 1977), recognized that Texas procedure affords no preliminary hearing, yet contended that the state's revocation process gives the accused more due process protection than required by *Morrissey* and *Scarpelli*.

Ironically, by relying on a decision which avoided *Scarpelli* in order to give an indigent *more* protection than that case might otherwise require, the Texas Court of Criminal Appeals has held that Texas procedure does not even require the "minimal" requirements of due process which *Scarpelli* mandated; *i.e.*, a preliminary hearing with notice, an impartial decision maker, a conditional opportunity to confront adverse witnesses, and a record of the hearing. As one scholar has stated, "the holding of the Texas Court of Appeals in *Whisenant* appears to be clearly erroneous." Hippard, "Annual Survey of Texas Law", 33 *S.W.L.J.* 505, 558 (1979). *See also*, Bissex, "Scarpelli: A Mandate for Change of the Due Process of Law Requirements in Texas Probation Revocation Hearings," *Hou.L.Rev.* 895 (1974).

Although Texas procedure may provide the minimum requirements of due process as to the actual revocation hearing, it certainly has turned a deaf ear to the first step in the minimum due process required — a preliminary hearing which must be had to warrant incarceration of a probationer until his final hearing. The

possibility — even the probability — exists that an accused will have no counsel nor be aware of his right to have counsel; will not be aware of nor be able to invoke his right to seek bail, and will not be aware that he has the right to demand a hearing within twenty days of his arrest where bail is not granted. Any argument that Texas provides a hearing within a reasonable time is illusory. The state may hold the hearing at its leisure while the accused remains incarcerated because of an alleged "violation" for which there has been no determination of probable cause.

PROPOSITION II

Vincent timely filed his Notice of Appeal under U.S. Sup. Ct. Rule 11(1), 28 U.S.C.

U.S. Sup. Ct. Rule 11, 28 U.S.C. ("Rule 11') states that an appeal to review the judgment of a state court of last resort in a criminal case "shall be deemed in time" when the notice of appeal prescribed by Rule 10 is "filed with the clerk of the court possessed of the record" within ninety (90) days after the entry of such judgment and the case is docketed within the time provided in Rule 13." The assertion has been made that this appeal was not timely filed since no Notice of Appeal was filed with the Texas Court of Criminal Appeals within the time permitted by Rule 11. Notice of Appeal was filed with the District Court of Ochiltree County, Texas on January 4, 1980.

The four cases originally cited by the State of Texas in its Motion to Dismiss are inapposite.[1] Each is a memorandum decision which states simply that the appeal was dismissed where not timely filed. In this case, the requisite Notice of Appeal was filed with a court possessed of the record. The only question is whether it was filed in the proper court. Consequently, none of the cited cases deal with question at hand.

Under Article TEX.CRIM.PROC.CODE ART. 40.09(1) (Vernon), the clerk of the court that entered the conviction sought to be appealed shall make and prepare an appellate record comprising "a true copy" of the matter designated by all parties. The matter so prepared shall be assembled under one cover and shall constitute the record on appeal. The record is to be made in duplicate and one copy is to be retained by the clerk for use by the parties with permission of the court. Consequently, under Texas procedure, the Court of Criminal Appeals has a record and the District Court has a record. Out of an abundance of caution, Vincent sought to file his Notice of Appeal in both courts, but for some unknown reason the Notice of Appeal was never filed with the Texas Court of Criminal Appeals.

Vincent has found no cases dealing with the precise point in issue. However, under a strict reading of the state statute, the original record remains with the clerk of the trial court and the copy becomes the appellate

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[1] *Richardson* v. *Blumenthal*, 435 U.S. 939 (1978); *Gabriel* v. *United States*, 429 U.S. 887 (1976); *Charger Investments Inc.* v. *Corbett*, 429 U.S. 877 (1976); *Taggart* v. *New York*, 392 U.S. 667 (1967).

record insofar as the state appeals process is concerned. Vincent respectfully submits that this court should not dismiss so important an appeal upon obscure points as to which court was "possessed of the record", where a Notice of Appeal was filed in a court possessed of the record. The new Rule 11.1, effective June 30, 1980, eliminates any in the old Rule 11 uncertainty by requiring the Notice of Appeal to be filed with the clerk of the court "from whose judgment the appeal is taken." Consequently, a decision in favor of timely filing would not affect future appeals nor would it create any uncertainty in the plain meaning of the new Rule 11.1.

CONCLUSION

Vincent requests this Court to either (a) reverse the order revoking his probation and direct the dismissal of the Texas proceedings resulting in said order, or, in the alternative, (b) reverse the order revoking his probation and remand the case for a determination of probable cause for the allegations in the State's Supplementary Motion to Revoke.

Respectfully submitted,

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BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1.(a) Whether Appellant Vincent was deprived of due process of law when his probation was revoked at a full and fair hearing that was not preceded by a preliminary hearing?

(b) If so, whether this Court should hold the Texas felony probation statute unconstitutional for its failure to establish an arrested probationer's right to a preliminary hearing; or, alternatively, for its failure to require that arrested probationers must be informed of their statutory right to a revocation hearing within twenty days after one is requested?

2.(a) Whether any error in wrongfully depriving Appellant Vincent of a preliminary hearing was rendered harmless by his subsequent full and fair revocation hearing that is presently unchallenged on any ground?

(b) If not, whether the Court's holding should apply retroactively?

3. Whether this appeal should be dismissed for Appellant Vincent's failure to file notice of appeal "with the clerk of the court possessed of the record" as required by former Sup. Ct. R. 11(1)?

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NO. 79-5962

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DANNY VINCENT,

Appellant

V.

THE STATE OF TEXAS,

Appellee

On Appeal From The
Texas Court of Criminal Appeals

BRIEF FOR APPELLEE

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES The State of Texas, Appellee herein, and in response to the Brief of Appellant Danny Vincent, would show the Court the following:

THE OPINION BELOW

The unpublished per curiam opinion of the Texas Court of Criminal Appeals is *Vincent v. State*, No. 60,564 (Tex.Crim.App., Sept. 19, 1979), and is set forth at

A.38.[1] *See* Table, 586 S.W.2d 880.

JURISDICTION

Appellant Vincent seeks to invoke jurisdiction under 18 U.S.C. §1253(2). (Brief for Appellant at 2.). Under 28 U.S.C. §1257(2), jurisdiction would be proper to review the constitutionally based judgment of the Texas Court of Criminal Appeals, except that Vincent has failed to comply with former Sup. Ct. R. 11(1), 28 U.S.C. (1970). That rule requires that notice of appeal must be filed with the court possessed of the record within ninety days after final judgment. Vincent has never complied with this requirement because he has never filed notice of appeal with the Texas Court of Criminal Appeals -- the court "possessed of the record" -- but only with the state trial court. (*See* the discussion in the Argument, Part III below). Therefore, the Court should not exercise jurisdiction over this cause.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites and sets forth a portion of the Fourteenth Amendment to the United States Constitution, as well as Tex. Code Crim. Proc. Ann. arts. 26.04(b), 40.09, sec. 1, and 42.12, secs. 3(b), 8(a). For the convenience of the Court, the entire Texas felony probation statute, Tex. Code Crim. Proc. Ann. art. 42.12, secs. 1-11, is set forth in the supplement to this brief.

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[1]Appellee will refer to the separately bound appendix as "A". The record on appeal is composed of a transcript, consisting of all pleadings, motions, and orders, and a statement of facts, which is the record of the actual revocation of probation hearing in question-and-answer form. The former will be referred to as "Tr."; the latter, as "R." Where an item appears in both the appendix and the transcript, only the former citation is provides.

Also involved is former Sup. Ct. R. 11(1), 28 U.S.C. (1970):

> An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

STATEMENT OF THE CASE

On May 23, 1977, in the 84th Judicial District Court of Ochiltree County, Texas, Appellant Danny Vincent pled guilty to the offense of burglary of a habitation. (A.3). His punishment was assessed on that day as a two thousand dollar fine and imprisonment for six years in the Texas Department of Corrections. (A.5). The imposition of sentence was suspended, however, and Vincent was placed on probation. (A.8). Among the conditions of probation were the requirements that he "commit no offense against the laws of this or of any other state or of the United States;" that he "avoid injurious or vicious habits;" that he "refrain absolutely from drinking intoxicants in all forms;" that he pay a small probation fee regularly and make restitution to the victim of his crime, provided that he was financially able to do so; and that he make written monthly reports to his probation officer concerning his employment. (A.10). Vincent's probation officer discussed all these conditions with Vincent. (R. 6-7, 92). He swore to obey them all. (A.10).

Approximately four months later, on October 3, 1977, the district attorney and a probation officer filed a motion for a warrant to arrest Vincent for the purpose of revoking his probation, alleging that on September 28, 1977, he had committed the criminal offenses of trespass and possession of marijuana. (A.12). Vincent was

arrested upon the resultant warrant and apparently remained in jail until October 18, 1977, when he signed and submitted a motion for release to the Court. (A.14). The same day, the trial judge signed an order granting his release and continuing him upon probation with the added conditions that he report weekly to his probation officer, that he "not associate with anyone known to use or to have used drugs of any type," and that he appear at any subsequent revocation hearing. (A.15, R.35). Again Vincent swore to obey these conditions. (A.14).

Less than four months later, on the evening of February 3, 1978, Jack Nelson, a Perryton, Texas, police officer, observed Vincent driving his car in an irregular manner. (R. 41-43). Nelson had some difficulty in getting Vincent to pull his vehicle over to the side of the road. (*Id.*). When Vincent finally did so and got out of his car, Nelson observed:

> [H]is hair was a little messed up. He was glassy eyed and he propped up against the car and also smelled alcohol on his breath.

(R.45). Vincent told Nelson that he was on probation (R.47) and that he had been drinking beer. (R.83). Vincent, in fact, testified at his eventual revocation hearing that he had been drinking beer for "[s]even or eight hours" before his arrest. (*Id.*). Nelson arrested him for driving while intoxicated (R.49), and called Jeff Hooper, Vincent's probation officer,to meet him at the Perryton police station (R.47), where he then transported Vincent.

Hooper met Vincent and Nelson within minutes of their arrival at the police station. (R.49). He discussed the arrest with Nelson (R.29), and gave Vincent his *Miranda* warnings. (R.31). He then spent thirty to forty minutes with Vincent (R.13), observing the following:

> His eyes were bloodshot, he had alcohol odor on his breath, he was very talkative. . .His

> walking, he seemed to sway a little bit when he walked, slow steps. . .His speech was slurred.

(R.14). Hooper stated that in his experience -- which included a Bachelor of Science degree in criminal justice, a year as chief of police in another Texas city (R.17), and extensive work as a probation officer with "people who have alcoholic problems" (*Id*) -- Vincent was intoxicated. (R.20).

Officer Nelson's observations at the police station during this time corroborated Hooper's:

> [Vincent] was very talkative. His walk was kind of a weave and he was very slow in walking. . .[His walk] was slow and hesitant. He was unsure of himself.

(R.50). As he had concluded before the arrest, Nelson was convinced Vincent "was under the influence" of intoxicants. (R.52).

Three days later, on February 6, 1978, the district attorney and a probation officer filed a supplementary motion for Vincent's arrest and to revoke his probation. (A.16). The motion alleged that Vincent had broken four conditions of his probation in that he had committed the criminal offense of driving while intoxicated, had failed to refrain from drinking intoxicants, had failed to pay his probation fees for two months, and had failed to submit his written monthly employment report in January, 1978. (A.16-17).

Vincent was apparently released that weekend, but was rearrested on February 6, 1978, (A.21), and remained in jail until March 27, 1978, when he was released on bond. (R.23,74,80,112). Meanwhile, on approximately February 17, 1978, Vincent had a discussion with Jeff Hooper in the jail. Hooper advised him to retain an attorney if he didn't already have one. (R.77). At some point, Vincent contacted Danna Kay Archer, the attorney who had represented him during

the earlier burglary proceedings ending in probation. (A.3,5,8). He contacted Archer twice himself (R.92), talking to her on the telephone on one occasion (R.76), and other discussions were held with her by other persons on his behalf (R.92). Vincent didn't know that Archer was not going to represent him in the revocation of probation proceedings until shortly before he talked to his eventual and present attorney, Robert D. McCutcheon, on March 15, 1978. (*Id.*).

On March 2, 1978, a notice setting a hearing for March 27, 1978, to determine why probation should not be revoked was filed with the court (A.24-25). The record does not reflect whether the State, Vincent, or the court sua sponte instigated this setting. The trial court formally appointed Robert McCutcheon counsel for Vincent on March 24 (Tr.22; Brief for Appellant at 5), although McCutcheon and Vincent had met on March 15, 1978. (R.76). The court on March 27 also heard formal prehearing motions (Tr.17-20), and ordered Vincent's bond reduced from $7500.00 to $5000.00. (Tr.24). The record contains no original bond setting.

A formal revocation hearing was held before the 84th District Court of Ochiltree County, Texas, on April 10, 1978. Three witnesses, including probation officer Hooper and Jack Nelson, the arresting police officer, testified for the State of Texas, and three witnesses, including Vincent, testified for the defense. Vincent admitted at the hearing, as he had to the arresting police officer weeks earlier, that he had violated the terms and conditions of his probation by drinking and driving. (R.83-84). His explanation for this conduct was as follows:

> Well, I had -- I was sort of talked into it and that and stresses and strains, it was a release type. I couldn't cope with what was happening to me so I had to find some way out of it.

(R.84).

Vincent's probation was revoked by the trial judge of the 84th District Court on June 5, 1978, for driving while intoxicated. (A.28). On July 11, 1978, he was sentenced by the court to serve six years in the Texas Department of Corrections. (A.32-33). On August 2, 1978, his appeal bond was increased from $2000.00 to $12,000.00. The record does not reflect how or when his bond had been reduced from its earlier $5000.00 setting.

Vincent appealed to the Texas Court of Criminal Appeals, challenging his probation revocation primarily on the ground that he was denied due process of law in failing to receive a preliminary hearing prior to his revocation hearing. He further alleged that Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8, is unconstitutional for failing to provide such a preliminary hearing.

The Texas Court of Criminal Appeals affirmed the revocation in *Vincent v. State*, No. 60,564 (Tex.Crim.App., Sept. 19, 1979), an unpublished opinion (A.38). *See* Table, 586 S.W.2d 880. A motion for rehearing was denied on October 10, 1979. This appeal followed.

SUMMARY OF ARGUMENT

I. The historical, statutory, and case law development of probationers' rights in Texas has always paralleled or exceeded this Court's pronouncements as to the procedural and substantive process that is due parolees and probationers under the United States Constitution. The Texas Court of Criminal Appeals has consistently accorded Texas probationers more procedural due process rights than mandated by this Court in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The Texas Legislature and the Court of Criminal Appeals have fashioned probation revocation procedures in Texas that have consistently been thought to go further than the minimal constitutional requirements. This Court, especially in light of its

previous admonitions that the states should have flexibility to develop their own procedures for according due process of law to arrested probationers, should endorse the Texas procedures.

It is true that appellant Vincent received no preliminary hearing after his arrest for violating the conditions of his probation and before his revocation hearing. But the primary purpose of a preliminary hearing, a judicial determination of probable cause to prevent lengthy pretrial incarceration on an insubstantial basis, was fulfilled by other features of Texas law. Vincent was arrested by a police officer for driving while intoxicated. He admitted to the officer that he was on probation and had been drinking. His probation officer met with him minutes after his arrest and determined that Vincent was in violation of the conditions of his probation. A warrant for Vincent's arrest was then issued by a Texas judge after the presentation of some evidence by state authorities. After he was incarcerated, Vincent failed to avail himself of his statutory right to a revocation hearing within twenty days, even though he had free access to attorneys during the time he was in jail. He was, in fact, released on bond prior to his eventual revocation hearing, at which he was represented by appointed counsel and accorded an unchallenged full and fair opportunity to argue that he should be continued on probation, in spite of his obvious violation of the conditions of probation. All these procedures, especially in light of the existing procedures in other jurisdictions, are ample to show that Vincent has not been denied due process of law.

In the alternative, the Texas probation revocation statute should not be declared unconstitutional for failure to afford probationers a preliminary hearing. Instead, if there is a constitutional defect in the Texas statutes, it is only that there is no requirement that arrested probationers be informed of their right to a full revocation hearing within twenty days after one is

requested. Such a holding should mark the limits of this Court's incursion upon Texas probation procedures.

II. Vincent complains that he was denied a preliminary hearing to establish probable cause. If the pre-hearing procedures were insufficient to substitute for that determination, then Texas argues that the error was rendered harmless in light of the subsequent full and fair revocation hearing. It would be pointless in the extreme to remand this cause for a determination of probable cause when Vincent was found guilty of violating the conditions of his probation upon a preponderance of the evidence at his actual hearing on the merits. Vincent could not have been prejudiced by the past failure to have determined that there was probable cause to arrest him because the outcome of his revocation hearing indisputably establishes that such a minimal burden would easily have been met. Clearly Vincent's present incarceration is not a result of any past wrong.

Any decision adverse to Texas should be applied prospectively only. Texas and other states have in many cases refused to accord preliminary hearings to arrested probationers where adequate procedural substitutes have been provided. Thousands of incarcerated probation offenders should not be released where the states have erroneously believed in good faith that they were complying with all constitutional requirements.

III. This appeal should be dismissed because Vincent failed to comply with former Sup. Ct. R. 11(1), requiring that notice of appeal to this Court be filed in the court possessed of the record within ninety days after judgment. In this case, the court possessed of the record, as well as the court rendering the final judgment from which Vincent seeks to appeal, is the Texas Court of Criminal Appeals, the highest Texas court with criminal jurisdiction. Instead, Vincent filed notice of appeal in the state convicting trial court, which was

neither possessed of the complete record nor the source of the judgment from which he now seeks to appeal. In light of the policies of Rule 11, this Court should now dismiss the appeal for want of jurisdiction to entertain it.

ARGUMENT

I.

TEXAS PROBATION REVOCATION PROCEDURES ARE CONSTITUTIONAL AND DENIAL OF A PRELIMINARY HEARING DID NOT DEPRIVE APPELLANT VINCENT OF DUE PROCESS OF LAW.

A. Texas Probation Revocation Procedures Exceed the Due Process Requirements of the Fourteenth Amendment.

1. The judicial and legislative development of the due process and statutory rights of probationers in Texas has always paralleled or exceeded the development of probationers' due process rights in this Court.

The federal law

Federal constitutional development of the due process rights of probationers is a comparatively recent phenomenon. The modern concept of probation, in fact, was unknown to the common law, although English courts historically had "a sentencing discretion that varied from era to era in British history." Cohen, *Sentencing, Probation and the Rehabilitative Ideal: The View From Mempa v. Rhay*, 47 Tex. L. Rev. 1, 18 (1968). Modern probation practices derived from the common law practice of suspending the sentences of persons who were pregnant, insane, pardoned by the crown, or not the same person as convicted by the jury. Note, 5 Tex. Tech. L. Rev. 833, 834 (1974), *citing* 4 W. Blackstone, Commentaries 396. *See Ex parte United States*, 242 U.S. 27, 44-45 (1916).

Although some commentators believe that probation may have been used as early as 1681 in the American colonies, A. Campbell, Law of Sentencing, §11 at 51-52 (1978), *citing* S. Rubin, the Law of Criminal Corrections, 176-77 (1963), it was not employed systematically until at least 1850. 8 Gonzaga L. Rev. 110 (1972). Massachusetts promulgated the first American probation statute in 1878. Campbell, §11 at 52 n. 51. It was this Court's holding in *Ex parte United States*, 242 U.S. 27 (1916), to the effect that there is no inherent judicial power to probate sentences, that led to enactment in 1925 of the first federal probation law, Act of Mar. 4, 1925, ch. 521, 43 Stat. 1259-61 (currently 18 U.S.C. §3651). Comment, 11 Hous. L. Rev. 895, 896 (1974); *see Roberts v. United States*, 320 U.S. 264 (1943).

In 1932 the Court held that probationers have few, if any, due process rights or procedural protections, *Burns v. United States*, 287 U.S. 216 (1932). The primary basis of the decision was that probation is a privilege, not a right, and consequently its revocation was viewed as a matter within the discretion of the trial court. *Id.* at 220-22. This holding was reaffirmed three years later in *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935), which characterized probation as an "act of grace."

In *Mempa v. Rhay*, 389 U.S. 128 (1967), the unanimous Court, speaking through Mr. Justice Marshall, drastically altered the status of probationers in the eyes of the Constitution. The Court noted that *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Hamilton v. Alabama*, 368 U.S. 52 (1961), *Moore v. Michigan*, 355 U.S. 155 (1957), and *Townsend v. Burke*, 334 U.S. 736 (1948), "clearly stand for the proposition that appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Mempa*, 389 U.S. at 134. Consequently, while applauding Washington's sentencing proceeding as "an enlightened step forward," the Court decided "that a lawyer must be afforded at this proceeding whether it is labeled a

revocation of probation or a deferred sentencing." *Id.* at 137.

In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court for the first time accorded substantial due process protections to parolees threatened with revocation. Reasoning that parolees have some liberty interest in their status such that its "termination calls for some orderly process, however informal," *id.* at 482, the Court established a two-step process. First, primarily because there is "typically" a substantial time lag between arrest and revocation and geographic disparity between the site of the arrest and the revocation, the Court mandated a preliminary hearing "at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." *Id.* at 485. The constitutional requirement of this hearing, *id.* at 485-87, may be summarized as follows:

(1) The preliminary hearing must be before an independent, though not necessarily a judicial officer.

(2) There must be fair notice of the time, place, and purpose of the hearing.

(3) The accused must be able to speak on his own behalf.

(4) Upon request, he must be able to confront and question adverse witnesses, unless a security risk is shown.

(5) There should be a written summary of the hearing.

(6) Reasons for a finding of probable cause should be provided.

Morrissey provided similar but expanded rights at the subsequent parole revocation hearing: written notice of the alleged violations, disclosure of adverse

evidence, opportunity to speak and present evidence, opportunity to confront and cross-examine adverse witnesses (unless a security risk is shown), and a written summary by the factfinders, *Id.* at 489.

Less than a year later, the Court decided *Gagnon v. Scarpelli*, 411 U.S.778 (1973), the case that is the principal battle ground of the present dispute. Noting that *Mempa v. Rhay*, 389 U.S. 123 (1967) and *Morrissey v. Brewer*, 408 U.S. 471 (1972), "set the bounds for our present inquiry," *Scarpelli* at 781, the Court noted that respected commentators unanimously -- and presumably correctly -- "have agreed that revocation of probation where sentence has been imposed previously is constitutionally indistinguishable from the revocation of parole." *Id.* at 782 n. 3. Because the *Scarpelli* probationers had been sentenced at the time of trial, the Court viewed them as situated similarly to the *Morrissey* parolees rather than the *Mempa* probationer, who had not been sentenced until his probation was revoked.

Thus, the *Scarpelli* Court held the *Morrissey* procedural guarantees applicable to previously sentenced probationers. *Scarpelli* at 786. The Court declined to establish a *Mempa* per se right to counsel in such circumstances, however, believing that a case-by-case determination would adequately serve the ends of justice. *Scarpelli* at 790.

The Texas law

The Texas Legislature enacted its Suspended Sentence Law, Tex. Penal Code arts. 776-781, in 1913. *See* Morrisson, *Interpretive Commentary*, foll. Tex. Code Crim. Proc. Ann. art. 42.12. The modern statute was passed in 1965 to correct prior claims of abuse, "either real or supposed." Onion, *Special Commentary*, foll. Tex. Code Crim. Proc. Ann. art. 42.12.

The elaborate panoply of procedural and substantive

guarantees accorded probationers in Texas will be more fully explored below. Probation has not been the procedural stepchild in Texas that it has been in some other states. First, its use as a rehabilitative tool has "experienced astounding growth" in recent years. Arnold, *A Survey of Recent Law Concerning Revocation of Probation in Texas*, 52 S. Tex. L. J. 92 (1974). In 1979, for example, there were a total of 52,412 felony convictions in Texas; 33,252 of these resulted in probation. Texas Judicial Council, 51st Annual Report at 132 (1979). The statistics for the years 1975 through 1978 are substantially similar, with approximately 60% of all felony convictions ending in probation. (*See* Supplement B hereto). On September 1, 1976, there were more adult felony probationers in Texas -- 52,250 -- than in any other state except California, which on that date had 63,324 such probationers. *U.S. Department of Justice, State and Local Probation and Parole Systems*, Table 6 at 35 (Feb., 1978). By contrast, New York, for example, had only 25,228 probationers and Illinois, 11,343. (*id.*).

During the same time, the hallmarks of developing Texas probation law included revocation proceedings that were always judicially, never administratively, conducted. With few exceptions, all the rules of criminal procedure are applicable. There is an unqualified per se right to counsel at Texas revocation of probation proceedings, as well as unlimited right of appeal to the Texas Court of Criminal Appeals.

Given these developments, the holdings in dicta of the Texas Court of Criminal Appeals in *Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973), *Grant v. State*, 505 S.W.2d 259 (Tex.Crim.App. 1974), and *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977) -- so roundly criticized in the Brief for Appellant at 12-14 -- are much more understandable. In considering whether Texas probationers faced with possible revocation enjoy the right to counsel, the Court of Criminal Appeals has duly noted the Mempa-Scarpelli distinction based upon

suspension of imposition or suspension of execution of sentence. It is *Mempa*, not *Scarpelli*, that more closely resembles the Texas procedure.

It is also true that this Court has made it very clear that there is much room for flexibility in the promulgation of state codes of criminal procedure respecting revocation proceedings:

> We cannot write a code of procedure; that is the responsibility of each State. . .
>
> We have no thought to create an inflexible structure for parole revocation procedures.

Morrissey v. Brewer, 408 U.S. at 488, 490. Probationers for many years have occupied a favored status in Texas criminal law; it is this status that has caused the Texas Court of Criminal Appeals to reject as inadequate the protections afforded probationers by *Gagnon v. Scarpelli*. Where a probationer has pointed out a particular right -- such as the right to a preliminary hearing insisted upon by Vincent -- apparently afforded probationers under *Scarpelli*, but not afforded Texas probationers generally, the Court of Criminal Appeals has somewhat indignantly responded that the Texas probation revocation procedures in general greatly exceed the constitutional requirements. As a result, the Court of Criminal Appeals not unreasonably has believed that there is room for some play in the constitutional joints concerning specific details of its overall probation procedures.

2. Texas has responded appropriately in fashioning its own scheme of due process for probationers.

As this Court stated in *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972):

> Once it is determined that due process applies, the question remains what process is due. It has

> been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.

Examination of the procedural protections afforded probationers in Texas in comparison with those in other jurisdictions, *see* Supplement C, is indeed startling. First, a probationer in Texas ordinarily cannot be arrested until there has already been a judicial determination of probable cause. A probation officer is not a peace officer within the meaning of the Texas statutes. Tex. Code Crim. Proc. Ann. art. 2.12. For that reason, his power to arrest a probationer or anyone else is no greater than that of a private citizen. That power, as stated in Tex. Code Crim. Proc. Ann. art. 14.01, is the power to arrest without a warrant whenever an offender commits "in his presence or within his view" any offense "classed as a felony or as an offense against the public peace." Thus, Texas probationers are protected from arrest by their probation officers unless, in compliance with Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8, such probation officer obtains "the order of the judge of such court" that the probationer should be arrested. *Cf.* 18 U.S.C. §3653, which allows federal probation officers to arrest probationers without a warrant.

Arrested Texas probationers may be admitted to bail in the discretion of the trial court. *Ex parte Ainsworth*, 532 S.W.2d 640 (Tex.Crim.App. 1976); *Valdez v. State*, 508 S.W.2d 842 (Tex.Crim.App. 1973). They enjoy both a general due process and a specific statutory right to a speedy revocation hearing. The former derives from the holdings of Texas courts that the speedy trial rights embodied in U.S. Const. amend. VI and Tex. Const. art. I, §10, are applicable to probation revocation proceedings. *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971). *See* Part II (A) below.

Further, Tex. Code Crim. Proc. Ann. art. 42.12, sec.

8(a) provides that a revocation hearing must be held within twenty days after one is requested. This provision is very strictly construed, *Ex parte Trillo*, 540 S.W.2d 728 (Tex.Crim.App. 1976), and is obviously designed to safeguard arrested probationers from undesirably lengthy pre-hearing incarceration.

The site of a revocation hearing is the state convicting court or the jurisdiction "where a violation of the conditions of probation occurs." Tex. Code Crim. Proc. Ann. art. 42.12, sec. 5.

As Vincent concedes, Texas provides far more than is constitutionally required at the hearing to revoke probation. (Brief for Appellant at 11-12). All the following additional features of the Texas scheme have been construed in favor of probationers:

(a) Texas probationers are entitled to detailed written notice of the claimed violations of probation. *Gordon v. State*, 575 S.W.2d 529 (Tex.Crim.App. 1978); *Graham v. State*,502 S.W.2d 809 (Tex.Crim.App. 1973); *Burkett v. State*, 485 S.W.2d 578 (Tex.Crim.App. 1972).

(b) There is a per se right to appointed counsel for indigent probationers. *Ex parte Sanders*, 588 S.W.2d 383 (Tex.Crim.App. 1979); *Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973).

(c) Unfavorable evidence must be disclosed. *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977).

(d) The opportunity to be heard in person and to present witnesses and documentary evidence must not be abridged. *Whisenant v. State; Masters v. State*, 545 S.W.2d 180 (Tex.Crim.App. 1977).

(e) Probationers have the right to confront and cross-examine adverse witnesses. *Whisenant v. State; Masters v. State.*

(f) A judicial and neutral setting is provided for the determination whether to revoke probation, at which the rights of speedy trial, *Carney v. State*, 573 S.W.2d 24 (Tex.Crim.App. 1978), the Fourth Amendment exclusionary rule, *Tamez v. State*, 534 S.W.2d 686 (Tex.Crim.App. 1976), protection from coerced confessions, *Dowdy v. State*, 534 S.W.2d 336 (1976), and virtually all other procedural rules associated with ordinary criminal trials are fully applicable. *Whisenant v. State; Masters v. State; Lovorn v. State*, 536 S.W.2d 356 (Tex.Crim.App. 1976).

(g) The probationer is entitled to a written statement by the factfinders as to the evidence relied on and reasons for revoking probation. *Whisenant v. State; Sappington v. State*, 508 S.W.2d 840 (Tex.Crim.App. 1974).

(h) There is a full right of appeal from the decision to revoke probation. Tex. Code Crim. Proc. Ann. art. 40.09.

From examination of the statutes and case law of other jurisdictions, it appears safe to say that few, if any, other states afford their probationers all these procedural and substantive protections. (*See* Supplement C). The Texas procedures far exceed those suggested by the ABA Standards Relating to Probation, §§5.1-5.4 (Feb. 1970 Draft). Only by myopically focusing in a manifestly unfair manner upon a very minor aspect of the Texas procedures -- the lack of a preliminary hearing -- may it be concluded that the Texas statutory scheme is deficient. Appellee avers that it is not.

3. In view of the fact that Vincent received a judicial determination of probable cause before he was arrested and was released on bond prior to his full and fair revocation hearing, he was not entitled to a preliminary hearing.

Consideration of all the facts of Vincent's case lead ineluctably to the conclusion that he has received ample due process protections. Wholly apart from his revocation hearing, which is unchallenged on any due process ground and could not be so challenged because of its full and fair nature, it should be recalled that he was arrested for driving while intoxicated by a police officer to whom he admitted that he was on probation and had been drinking. (R. 47, 83). The police officer formed the opinion that he was intoxicated, and called his probation officer. (R. 47, 49). He transported Vincent to jail where they were both met by Vincent's probation officer. (R. 49). That officer spoke with Vincent for a lengthy period of time, observed that he was intoxicated, and discussed the matter further with the arresting officer. (R. 13,14,31). He obtained a warrant for the arrest of Vincent. (A. 16-18). The order granting the arrest warrant issued by the trial judge states that the Court heard and considered the evidence offered in support and believed there was ample cause to arrest Vincent. (A. 18).

After being arrested, Vincent was hardly held incommunicado. He had a telephone conversation with his previous attorney and was visited by his probation officer. (R. 76-77, 92; Tr.22). He obtained a new attorney while in jail. (R. 76,92). Bail was available to him and he in fact was released on bond weeks before the revocation hearing. (Tr. 24; R. 23, 74, 80, 112).

In light of all these circumstances, the Court should not hold that Texas violated Vincent's constitutional rights by not affording him a preliminary hearing. Vincent admitted violating his probation at the time of his arrest. There was a judicial determination of probable cause to arrest him for that violation. He had free access to attorneys during the time he was in jail, and was released on bond prior to the eventual hearing, at which he received many more procedural protections than those minimally required by the Constitution.

To hold that in spite of all these factors, Texas was nevertheless bound to go through the meaningless formalistic ritual of a preliminary hearing would be contrary to this Court's frequent admonitions that the Constitution provides for flexibility in state procedures concerning the protection of criminals' rights. Moreover, in light of the purpose of the preliminary hearing, it would impermissibly elevate form over substance. The principal such purpose -- to prevent lengthy pretrial incarceration with no judicial determination of probable cause -- was achieved by other means in Vincent's case. A second such purpose, to preserve any relevant testimony of witnesses, was fulfilled by the full and fair revocation hearing that itself under Texas law required the presence and testimony of relevant witnesses.

Appellant Vincent has not been deprived of due process of law, but has in fact been treated more fairly than he might have been in virtually any other jurisdiction.

Indeed, it is worthwhile to note the numerous judicially created exceptions to the general requirement of a preliminary hearing in those jurisdictions -- many of which, unlike Texas, have no provision for any other judicial determination of probable cause prior to arrest. It has often been held, for example, that where the probationer is not taken into custody until the revocation hearing, there is no need for a preliminary hearing at all. *United States v. Sciuto*, 531 F.2d 842, 846 (7th Cir. 1976); *Fay v. Commonwealth*, 399 N.E.2d 11 (Mass.S.Jud.Ct. 1980); *Curtis v. State*, 370 N.E.2d 385, 387-88 (Ind.Ct.App. 1977); *State v. Fry*, 550 P.2d 697 (Wash.Ct.App. 1976); *Pearson v. State*, 241 N.W.2d 490, 493 (Minn. 1976); *Petition of Meidinger*, 539 P.2d 1185 (Mont. 1975).

There is no need for preliminary hearing where the probationer is validly incarcerated on other grounds. *United States v. Sutton*, 607 F.2d 220 (8th Cir. 1979);

United States v. Tucker, 524 F.2d 77 (5th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). There is no need for a preliminary hearing where the probationer or parolee has already been indicted by a grand jury for a different offense, *Inmates' Councilmatic Voice v. Rogers*, 541 F.2d 633, 635 (6th Cir. 1976), or where the parolee or probationer has already been convicted of another offense, *Jones v. Johnston*, 534 F.2d 353, 357 (D.C. Cir. 1976).

Other courts have held that there is no need for a preliminary hearing where the probable cause is evident, as, for example, where the probationer is arrested out of state in apparent violation of a plain condition of his probation. *Chilembwe v. Wyrick*, 574 F.2d 985, 987 (8th Cir. 1978); *Stidham v. Wyrick*, 567 F.2d 836, 837-38 (8th Cir. 1977).

There is no need for a preliminary hearing where the parolee or probationer admits that he is in violation of his parole or probation. *State v. Lohnes*, 266 N.W.2d 109 (S.D. 1978); *People v. Rial*, 249 N.W.2d 114 (Mich. 1976); *Gardner v. Collier*, 274 So.2d 662 (Miss. 1973).

Clearly a preliminary hearing is not an indispensible element of the due process that must be afforded probationers. In some circumstances it may be a valid means of implementing due process interests. But in others, it is not an invariable or even the best means of implementing such interests. In light of the entire Texas statutory scheme and the facts of the instant case, the failure to give Vincent a preliminary hearing did not deny him due process of law.

B. If the Texas Probation Revocation Statute is Unconstitutional, It can only be Unconstitutional to the Extent that it does not Provide for Notice to be given to Arrested Probationers of their Right to a Prompt Hearing.

Alternatively, Texas asks that Tex. Code Crim. Proc.

Ann. art. 42.12 not be held unconstitutional for failure to afford Vincent a preliminary hearing. There is a much less onerous alternative, in light of the Texas statute, that would appear uncontestably to fulfill all the goals of a preliminary hearing set forth in *Gerstein v. Pugh*, 420 U.S. 103 (1975) and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). Vincent correctly notes the statutory requirement that a full revocation hearing be held within twenty days after one is requested by the arrested probationer. His principal complaint is that he was allegedly unaware of this protection. Surely he would not be before the Court if he had known he possessed the means to end his prehearing incarceration after only twenty days. The most, therefore, that this Court should do is to hold the Texas statute unconstitutional only to the extent of its failure to inform arrested probationers of their statutory right to a revocation hearing within twenty days after one is requested. Such relief would be much less burdensome to Texas, and yet afford arrested probationers all important rights to which they are entitled.

II.

ANY ERROR IN NOT ACCORDING VINCENT OR ANY OTHER TEXAS PROBATIONER A PRELIMINARY HEARING IS, IN LIGHT OF THE TEXAS REQUIREMENTS OF A PRE-ARREST DETERMINATION OF PROBABLE CAUSE AND A FULL AND FAIR REVOCATION HEARING, HARMLESS BEYOND A REASONABLE DOUBT.

A. The Texas Courts' Refusal to Accord Vincent a Preliminary Hearing has no Bearing on his Present Incarceration.

Vincent, as discussed in detail in Part I(A) above, was accorded a full panoply of due process rights at his

probation revocation hearing. His present constitutional challenge is limited to the assertion that he did not receive a preliminary hearing. He complains of no inadequacy or deficiency whatsoever in the revocation proceedings. Further, he admitted the basis of his revocation at the hearing -- that he was driving while intoxicated. He challenges only an allegedly improper temporary detention prior to the revocation hearing. And he raises this challenge even though he was arrested for violating his probationary conditions only after issuance of a judicial warrant executed after a showing of probable cause. (A. 18).

Vincent offers the Court two choices in the event it is concluded he was wrongfully denied a preliminary hearing. First, he suggests that the Court "remand the case for a determination of probable cause" that he has violated the conditions of his probation. (Brief of Appellant at 17). Vincent has, however, already received this determination -- not once, but twice. First, the state trial court "heard and considered the evidence" and determined that a warrant for Vincent's arrest should issue. (A. 18). Second, at the hearing on the merits, the trial judge determined that the State had fulfilled its burden to show by a preponderance of the evidence that Vincent had violated his probationary conditions. If the State adduced "that greater weight of the credible evidence which would create a reasonable belief that the defendant has violated a condition of his probation," the necessary Texas standard under *Scamardo v. State*, 517 S.W.2d 293, 298 (Tex.Crim.App. 1974), that the State has demonstrated probable cause to arrest is *a fortiori*. Vincent also asks that the Court reverse the judgment and "direct the dismissal of the Texas proceedings" in their entirety. (Brief of Appellant at 17). That avenue of relief, however, should be foreclosed because Vincent's present incarceration is not a result of the wrong he purportedly suffered: deprivation of a preliminary hearing.

This conclusion is apparent from examination of *Gerstein v. Pugh*, 420 U.S. 103 (1975), where the Court determined that unindicted defendants in Florida who were arrested without warrants were denied their rights to a preliminary hearing in violation of the Fourth Amendment to the United States Constitution. Even so: "[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." *Gerstein v. Pugh*, 420 U.S. at 119. The basis for this decision is the well-established rule that an illegal arrest or detention will not void a subsequent conviction. *United States v. Crews*, ___ U.S. ___ , 100 S.Ct. 1244 (1980); *Rose v. Mitchell*, 443 U.S. 545, 576 (1979)(concurring opinion of Stewart, J.); *Gerstein v. Pugh; Frisbie v. Collins*, 342 U.S. 519 (1952); *Ker v. Illinois*, 119 U.S. 436 (1886).

The *Gerstein v. Pugh* rule, as distilled from the so-called Ker-Frisbie doctrine, seems plainly applicable to Vincent, a probationer detained upon a warrant, but without a formal preliminary hearing. In fact, all courts that have considered the matter, including *Collins v. Turner*, 599 F.2d 657, 658 (5th Cir. 1979); and *United States v. Companion*, 545 F.2d 308, 313 (2d Cir. 1976), are apparently in unanimous agreement upon the point. *See also, United States v. Millican*, 600 F.2d 273, 275 (5th Cir. 1979), *cert. denied*, ___ U.S. ___ , 100 S.Ct. 1274 (1980); *United States v. Postal*, 589 F.2d 862, 873 (5th Cir.), *cert. denied*, 444 U.S. 832 (1979); *Pruitt v. Hutto*, 542 F.2d 458, 459 (8th Cir. 1976); *United States v. Marzano*, 537 F.2d 257, 271 (7th Cir.), *cert. denied*, 429 U.S. 1038 (1976); *United States v. Miller*, 532 F.2d 1335, 1339 (10th Cir.), *cert. denied*, 429 U.S. 839 (1976); *Britt v. McKenney*, 529 F.2d 44, 46 (1st Cir.), *cert. denied*, 429 U.S. 854 (1976); *United States v. Lira*, 515 F.2d 68, 72 (2d Cir.)(concurring opinion of Oakes, C.J.), *cert. denied*, 423 U.S. 847 (1975). *Cf. United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

The purpose of the *Gerstein v. Pugh* preliminary

hearing -- to determine probable cause -- is not precisely identical with that of the *Morrissey-Scarpelli* preliminary hearing, which serves the purpose of gathering and preserving testimony where the final revocation hearing may be held at a distant place from the violation. *Gerstein v. Pugh*, 420 U.S. at 867 n. 22. Nevertheless, the general nature of the claim that a defendant or probationer was denied a preliminary hearing, which is essentially one of illegal detention pending trial or final probation revocation, is the same. The established rule applied in *Gerstein v. Pugh* that an illegal detention will not void a subsequent conviction should be applied in the present case. Such a rule would not save Texas from an otherwise correct adjudication that its probation statute is at least in part unconstitutional, but would save Texas from the more onerous and unfair effects of such an adjudication.

It has been suggested that this analysis, focusing upon the inappropriateness of release from custody as a remedy for violation of a right bearing no relation to present incarceration, has "the unfortunate ring to it of affording a right without a remedy." *United States v. Companion*, 545 F.2d 308, 313 (2d Cir. 1976), *citing United States ex rel. Hahn v. Revis*, 520 F.2d 632, 639 (7th Cir. 1975). There are several satisfactory responses, however, as found by the Second Circuit Court of Appeals in *United States v. Companion*. This is particularly true in Texas.

First, for extreme violations, a claim for monetary damages under 42 U.S.C. §1983 or perhaps Tex. Rev. Civ. Stat. Ann. art. 6252-26, *see Estelle v. Gamble*, 429 U.S. 97, 107 & n.15 (1976), would seem appropriate. *Baker v. McCollan*, 433 U.S. 137 (1979); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). It is true that in light of the present pronouncements of the Texas Court of Criminal Appeals, especially *Whisenant v. State*, 557 S.W.2d 102 (Tex.Crim.App. 1977), a good faith defense based upon reliance on existing law would probably bar any such

cause of action. *See Procunier v. Navarette*, 434 U.S. 555 (1978); *Imbler v. Pachtman*, 424 U.S. 409 (1976). But a pronouncement that preliminary hearings are constitutionally required under Texas procedures would render a damages claim available in the future.

In addition, there are several aspects of Texas law that greatly ameliorate an arrested probationer's circumstances. (*See* Part I(A) above). In particular, the Texas courts have held that the general speedy trial rights established in the Sixth Amendment to the United States Constitution and Tex. Const. art. I, §10, are fully applicable to probation revocation proceedings in Texas. *Fariss v. Tipps*, 463 S.W.2d 176 (Tex. 1971). Hence, Texas probationers are protected by the provisions of *Barker v. Wingo*, 407 U.S. 514 (1972), as held in *Carney v. State*, 573 S.W.2d 24 (Tex.Crim.App. 1978).

Also, Texas provides a strict *statutory* right to a revocation hearing within twenty days after arrest, provided only that there be a request for such a speedy hearing. Tex. Code Crim. Proc. Ann. art. 42.12, sec. 8(a). The drastic remedy for violation of this statute is dismissal of the revocation motion. *Ex parte Trillo*, 540 S.W.2d 728 (Tex.Crim.App. 1976). An arrested probationer may seek his release from a pretrial incarceration on this basis by appropriate motion for hearing, motion for release on bond, or application for writ of habeas corpus. *Id. See* Note 5, Am. J. Crim. L. 354, 369-70 & n.64 (1977).

Finally, if an illegally arrested probationer is not released, Texas fully applies the exclusionary rule at probation revocation hearings to bar any evidence, testimonial or tangible, obtained as a result of an illegal arrest or detention. *Davis v. State*, 576 S.W.2d 378 (Tex.Crim.App. 1978); *Tamez v. State*, 534 S.W.2d 686 (Tex.Crim.App. 1976). Hence, although an illegal arrest or detention may not bar a subsequent revocation, Texas

does prohibit the use of the fruit of any such arrest or detention.

In summary, Vincent and other Texas probationers are sufficiently protected against the violation of a right to a preliminary hearing. Because Texas's final revocation procedures are indisputably valid, the *Gerstein v. Pugh* rule should be applied to prevent the entire probation revocation from being invalidated by a temporary, possibly illegal detention.

B. Any Holding Adverse to Texas should be Applied Prospectively Only.

In the substantive area of procedural protections for parolees, probationers, and prisoners, the Court when establishing a new rule has often followed the practice of announcing that the rule is to be applied prospectively only. *E.g., Wolff v. McDonnell*, 418 U.S. 539, 573 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972). If a holding adverse to Texas is contemplated here, Texas requests that that practice again be followed.

The Court's leading pronouncement upon the retroactivity of rulings embodying procedural guarantees is *Linkletter v. Walker*, 381 U.S. 618 (1965). As summarized in *Stovall v. Denno*, 388 U.S. 293, 297 (1967), the analysis established in *Linkletter* emphasizes the purpose to be served by the new standard, the extent of reliance by law enforcement authorities on the old standard, and the effect on the administration of justice of retroactive application of the new standard. *Desist v. United States*, 394 U.S. 244, 249 (1969).

The Court has applied those criteria to Morrissey-Scarpelli procedural rules in the past and found no sound basis for applying them retroactively. The overriding consideration has been the "significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior

law not requiring such procedures." *Wolff v. McDonnell*, 418 U.S. at 574. *See Morrissey v. Brewer*, 408 U.S. at 490. The Court has also examined whether procedural deficiencies and erroneous factual conclusions under the old procedures were "so pervasive" as to warrant the cost of a retroactive holding. *id.* In the instant case, these concerns militate strongly in favor on the non-retroactivity of any constitutionally based holding the Court might reasonably contemplate.

First, the impact of a retroactivity ruling upon the criminal justice systems and procedures in many states would be enormous. Numerous states, including many of the most populous, have refused to require preliminary hearings generally. (*See* Supplement C.) A ruling by this Court that a preliminary hearing is mandated in all circumstances and that the failure to provide one voids any subsequent probation revocation would have a widespread adverse effect on the administration of justice in Texas and elsewhere.

Probation is a commonly used tool in Texas to encourage effective rehabilitation of convicted criminals. In fact, during the past five years almost *sixty per cent* (60%) of all felony convictions in Texas have resulted in the imposition of probation. (*See* Supplement B). During the same period of time, there have been 20,926 revocations revoked (*id.*) following a full and fair final hearing. This statistic represents less than twenty per cent (20%) of all the probations granted in Texas -- *i.e.*, more than eighty per cent (80%) of all Texas probations appear to be successfully served (*id.*). Obviously, a significant although not precisely known number of inmates are presently incarcerated in the Texas Department of Corrections as a result of having had their probations revoked.

Second, the Texas courts have legitimately distinguished the Texas imposition of sentence probation revocation process from the Wisconsin execution of sentence revocation process that was

considered in *Scarpelli*. *See Ex parte Shivers*, 501 S.W.2d 898 (Tex.Crim.App. 1973). The Texas courts have determined that *Mempa v. Rhay*, 389 U.S. 128 (1967) furnishes the more appropriate guidelines for Texas procedures. Most significantly, the Texas courts have consistently adhered to the view that because of these guidelines, Texas is bound to *exceed* the minimal *Scarpelli* requirements. The Texas Court of Criminal Appeals, as discussed in detail in Part I (A) above, has consistently held, "The proceeding to revoke probation, although not the same as a criminal trial, requires substantially all the same procedures." *Whisenant v. State*, 557 S.W.2d 102, 104 (Tex.Crim.App. 1977).

Thus, the Texas courts have established revocation procedures for probationers "far greater than those required by *Morrissey v. Brewer*, *supra* and *Gagnon v. Scarpelli*, *supra*," *Whisenant*, 557 S.W.2d at 105, including, of course, a pro se right to counsel. In light of this approach, which also includes the substantial pre-revocation hearing protections discussed above, Texas should not be penalized for not requiring formal preliminary hearings in all cases.

Finally, the risk of procedural error is not so pervasive in the Texas probation revoction system as to warrant the cost or result of a retroactive requirement that preliminary hearings be held in all probation revocations. As argued above, every probationer is given a final revocation hearing at which he is accorded full due process rights. For that reason, the risk of an erroneous factual determination at a Texas probation revocation hearing is less than the risk in other states that accord preliminary hearings, but give very limited due process rights at the hearing on the merits of the revocation motion.

In fact, it is obvious that the only persons harmed as a result of the Texas procedures are those probationers who were erroneously incarcerated without probable cause before their revocation hearings. But these

persons have already received their remedy, either by being released sometime before their hearing or by having had their probation continued, not revoked, at such a hearing.[2]

Hence, the drastic remedy of a retroactive application of the rule advocated by Vincent would be unlikely to help those persons who have been wronged by its violation. No Texas revocation of probation following a full hearing should be voided by failure to have accorded the probationer a preliminary hearing because there is little, if any, reason to believe that he was ever wrongfully detained.

III.

VINCENT'S APPEAL SHOULD BE DISMISSED BECAUSE HE FAILED TO COMPLY WITH FORMER SUP.CT. R. 11(1), 28 U.S.C. (1970).

A. Vincent Has Not Timely Filed a Notice of Appeal to the Supreme Court of the United States with the Texas Court of Criminal Appeals, the "Court Possessed of the Record."

Former Sup. Ct. R. (11), 28 U.S.C. (1970) -- which was in effect when Vincent sought to file notice of appeal -- provides as follows:

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[2]*See* Supplement B, which demonstrates that fewer than half the motions to revoke probation filed by prosecutors in Texas are ultimately granted by the Texas courts. Even if a Texas judge finds at a revocation hearing that a probationer has violated the conditions of his probation, the judge may in his discretion nevertheless continue the probation or, in certain circumstances, reduce the originally assessed term of imprisonment if such a reduction is in "the best interests of society and the probationer." Tex. Code. Crim. Proc. Ann. art. 42.12, sec. 8(a).

> An appeal to review the judgment of a state court of last resort in a criminal case shall be deemed in time when the notice of appeal prescribed by Rule 10 is filed with the clerk of the court possessed of the record within ninety days after the entry of such judgment and the case is docketed within the time provided in Rule 13.

Vincent freely admits that he has failed to file notice of appeal to this Court with the Texas Court of Criminal Appeals, the deciding state court of last resort. (Brief for Appellant at 2, 15). Because of his failure to comply with this Court's rules, Vincent's appeal should be dismissed.

Vincent claims for the first time in his brief on the merits that he attempted to send notice of appeal to the Texas Court of Criminal Appeals, but that "for some unknown reason" (Brief for Appellant at 16) filing was never accomplished. He further claims and Texas concedes that he did accomplish filing with the state convicting court.

First, Vincent's recently raised claim that he attempted to file notice of appeal with the Texas Court of Criminal Appeals is without merit because it rests upon facts wholly outside and indeed refuted by the existing record. The record on appeal simply contains no notice of appeal whatsoever. And Vincent has produced no documentary proof that he ever attempted to file notice in the Court of Criminal Appeals.

Second, filing notice of appeal in the state trial court is insufficient to comply with former Rule 11(1). Although the trial court compiles the appellate record with material pleadings, court documents, a statement of facts, and briefs of both the defendant and the State, the trial court does not possess the full record. Its record does not contain copies of all the appellate proceedings. For example, motions for rehearing, supplemental briefs, and pro se briefs -- unlike the opening briefs of

the parties -- are filed only with the Texas Court of Criminal Appeals. Tex. Code Crim. Proc. Ann. art. 40.09, secs. 9, 10; Rules 11, 12, Texas Court of Criminal Appeals, *foll.* Tex. Code Crim. Proc. Ann. art. 44.33. Also, it is no small matter that the opinions of the appeals court are, of course, not contained in the records of the trial court.

Further, not all documents filed in the trial court are included in the record on appeal. Under Tex. Code Crim. Proc. Ann. art. 40.09, sec. 2, the parties file written designations of those items relevant to the merits of the appeal, as was done in this case. (A. 35). Only those items are forwarded to the Texas Court of Criminal Appeals and, for that matter, to this Court if it requests the record on appeal.

Vincent notes that under Tex. Code Crim. Proc. Ann. art. 40.09, sec. 1, the clerk of the trial court is required to prepare a duplicate copy of the appellate record. He argues, in an ingenious but sophistical attempt to circumvent the plain import of this Court's rules, "Under a strict reading of the state statute, the original record remains with the clerk of the trial court and the copy becomes the appellate record insofar as the state appeals process is concerned." (Brief of Appellant at 16-17). He intimates that because the original copy is filed with the trial court, he properly filed his notice of appeal there. This argument is both erroneous and irrelevant.

The relevant portion of art. 40.09, sec. 1, recites as follows:

> The record shall be made in duplicate and one copy shall be retained by the clerk for use by the parties with permission of the court.

It is unclear from this statute whether the trial court should retain the original record and transmit a copy to the Court of Criminal Appeals, or follow the converse procedure. At least one Texas case, *Paulos v. State*, 248

S.W.2d 928, 930 (Tex.Crim.App. 1952), suggests that the original record should generally be forwarded to the Court of Criminal Appeals. In truth, Tex. Code Crim. Proc. Ann. art. 40.09, sec. 15, provides that *either* original *or* duplicate copies of "papers or exhibits" should be included in the record on appeal depending upon the trial and appeal court's judgment as to the course of action most appropriate under the circumstances. In fact, Vincent's record appears to include some original and some duplicate items.

In any event, the location of the original trial record is irrelevant. What is crucial is the location of the *appellate* record, whether comprised mainly of original or duplicate documents. A Texas statute is unequivocal upon that point:

> Upon refusal of the [trial] court to grant defendant a new trial, *the clerk shall thereupon promptly transmit the record and briefs to the Court of Criminal Appeals*, in which court all grounds of error and arguments in support thereof urged in defendant's brief in the trial court shall be reviewed, as well as any unassigned error which in the judgment of the Court of Criminal Appeals should be reviewed in the interest of justice. (emphasis added).

Tex. Code Crim. Proc. Ann. art. 40.09, sec. 13. The statute plainly contemplates transmission of the record to the Court of Criminal Appeals. Because Vincent has never filed notice of appeal there, he has failed to file notice of appeal in the proper Court in a timely fashion. *See Richardson v. Blumenthal*, 435 U.S. 939 (1978); *Gabriel v. United States*, 429 U.S. 887 (1976); *Charger Investments, Inc. v. Corbett*, 429 U.S. 877 (1976); *Taggart v. New York*, 392 U.S. 667 (1967). *See also* R. Stern & E. Gressman, Supreme Court Practice 509, 516 (5th ed. 1978). The appeal should be dismissed.

B. Both the Policies underlying Former Sup. Ct. R. 11(1), 28 U.S.C. (1970), and the Language of Present Sup. Ct. R. 11(1), 28 U.S.C. (1980), Evidence an Intent that Notice of Appeals be Filed with the Deciding State Court of Last Resort.

This Court's intent in former Rule 11(1) may be determined by comparing the relative benefits of giving notice of appeal to the trial court and to the appeals court. A trial court ordinarily does not act as a pioneer of new areas of the law, but is instead bound by determinations of law set forth by appellate courts. The trial court's primary function is to develop facts properly and to apply those facts to existing law. An appeals court, however, particularly a court of last resort in a criminal case, often does pioneer new areas of law. Because of this aspect of its proper function, such a court can and does reverse decisions previously made by the trial court.

Vincent gave notice of appeal to the trial court, although such notice was futile once the conviction was final since the trial court could do nothing to reverse the prior decision. But Vincent might have given proper notice to the Texas Court of Criminal Appeals at a time when that court retained a measure of jurisdiction over the cause.

The present Sup. Ct. R. 11(1), 28 U.S.C. (1980), supports these interpretions. The Rule now recites that notice of appeal should be filed with "the court from whose judgment the appeal is taken." The clarification of Rule 11(1) evidences the result this Court intended to achieve with the old Rule 11(1).

CONCLUSION

For these reasons, Appellee the State of Texas respectfully prays that this appeal be dismissed or, in the alternative, that the judgment of the Texas Court of Criminal Appeals be affirmed.

Respectfully submitted,

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* Where information is unknown, a blank appears in the Chart. Information may be unknown because the statutes and case law of the jurisdiction are too vague to provide a certain answer; because the statutes and case law appear to conflict; or because for some other reason the matter appears unanswerable without reference to local practice.

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SUPPLEMENT A

Tex. Code Crim. Proc. Ann. art. 42.12
(Vernon 1979 & Supp. 1979)

Art. 42.12.

Adult Probation, Parole, and Mandatory Supervision Law

A. Purpose of Article and Definitions

Section 1. It is the purpose of this Article to place wholly within the State courts of appropriate jurisdiction the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of probation, and the supervision of probationers, in consonance with the powers assigned to the judicial branch of this government by the Constitution of Texas. It is also the intent of this Article to provide for the release of persons on parole and for the method thereof, to designate the Board of Pardons and Paroles as the responsible agency of State government to recommend determination of paroles and to further designate the Board of Pardons and Paroles as responsible for the investigation and supervision of persons released on parole. It is the intent of this Article to aid all prisoners to readjust to society upon completion of their period of incarceration by providing a program of mandatory supervision for those prisoners not relased on parole or through executive clemency and to designate the Board of Pardons and Paroles as the agency of government responsible for the program. It is the final purpose of this Article to remove from existing statutes the limitations, other than questions of constitutionality, that have acted as barriers to effective systems of probations and paroles in the public interest.

Sec. 2. This Article may be cited as the "Adult Probation, Parole, and Mandatory Supervision Law".

Unless the context otherwise requires, the following definitions shall apply to the specified words and phrases as used in this Article:

a. "Courts" shall mean the courts of record having

original criminal jurisdiction;

b. "Probation" shall mean the release of a convicted defendant by a court under conditions imposed by the court for a specified period during which the imposition of sentence is suspended;

c. "Parole" shall mean the release of a prisoner from imprisonment but not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Parole shall not be construed to mean a commutation of sentence or any other form of executive clemency;

d. "Mandatory supervision" shall mean the release of a prisoner from imprisonment but not on parole and not from the legal custody of the State, for rehabilitation outside of prison walls under such conditions and provisions for disciplinary supervision as the Board of Pardons and Paroles may determine. Mandatory supervision may not be construed as a commutation of sentence or any other form of executive clemency;

e. "Probation officer" shall mean either a person duly appointed by one or more courts of record having original criminal jurisdiction, to supervise defendants placed on probation; or a person designated by such courts for such duties on a part-time basis;

f. "Parole officer" shall mean a person duly appointed by the Director of the Division of Parole Supervision and assigned the duties of investigating and supervising paroled prisoners and prisoners released to mandatory supervision to see that the conditions of parole or mandatory supervision are complied with;

g. "Board" shall mean the Board of Pardons and Paroles;

h. "Division" shall mean the Division of Parole Supervision of the Board of Pardons and Paroles; and

i. "Director" shall mean the Director of the Division of Parole Supervision.

B. Probations

Sec. 3. The judges of the courts of the State of Texas having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public as well as the defendant will be subserved thereby, shall have the power, after conviction or a plea of guilty for any crime or offense, where the maximum punishment assessed against the defendant does not exceed ten years imprisonment, to suspend the imposition of the sentence and may place the defendant on probation or impose a fine applicable to the offense committed and also place the defendant on probation as hereinafter provided. In all cases where the punishment is assessed by the Court it may fix the period of probation without regard to the term of punishment assessed, but in no event may the period of probation be greater than 10 years or less than the minimum prescribed for the offense for which the defendant was convicted. Any such person placed on probation, whether in a trial by jury or before the court, shall be under the supervision of such court.

Sec. 3a. Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation for a period of any term of years authorized for the offense for which the defendant was convicted, but in no event for more than ten years, upon written sworn motion made therefor by the defendant, filed before the trial begins. When the jury recommends probation, it may also assess a find applicable to the offense for which the defendant was convicted. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make

such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. This law is not to be construed as preventing the jury from passing on the guilt of the defendant, but he may enter a plea of not guilty. In all eligible cases, probation shall be granted by the court, if the jury recommends it in their verdict, for the period recommended by the jury.

If probation is granted by the jury the court may impose only those conditions which are set forth in Section 6 hereof.

Sec. 3b. Where probation is recommended by the verdict of a jury as provided for in Sec. 3a above, a defendant's probation shall not be revoked during his good behavior, so long as he is within the jurisdiction of the court and his residence is known, except in accordance with the provisions of Sec. 8 of this Article. If such a defendant has no counsel, it shall be the duty of the court to inform him of his right to show any cause why his probation should not be revoked; and if such a defendant requests such right, the court shall appoint counsel in accordance with Articles 26.04 and 26.05 of this Code to prepare and present the same; and in all other respects the procedure set forth in said Sec. 8 of this Article shall be followed.

Sec. 3c. Nothing herein shall limit the power of the court to grant a probation of sentence regardless of the recommendation of the jury or prior conviction of the defendant.

Sec. 3d. (a) When in its opinion the best interest of society and the defendant will be served, the court may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it

substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on probation on reasonable terms and conditions as the court may require and for a period as the court may precribe not to exceed 10 years. However, upon written motion of the defendant requesting final adjudication filed within 30 days after entering such plea and the deferment of adjudication, the court shall proceed to final adjudication as in all other cases.

(b) On violation of a condition of probation imposed under Subsection (a) of this section, the defendant may be arrested and detained as provided in Section 8 of this Article. The defendant is entitled to a hearing limited to the determination by the court of whether it proceeds with an adjudication of guilt on the original charge. No appeal may be taken from this determination. After an adjudication of guilt, all proceedings, including assessment of punishment, pronouncement of sentence, granting of probation, and defendant's appeal continue as if the adjudication of guilt had not been deferred.

(c) On expiration of a probationary period imposed under Subsection (a) of this section, if the court has not proceeded to adjudication of guilt, the court shall dismiss the proceedings against the defendant and discharge him. The court may dismiss the proceedings and discharge the defendant prior to the expiration of the term of probation if in its opinion the best interest of society and the defendant will be served. A dismissal and discharge under this section may not be deemed a conviction for the purposes of disqualifications or disabilities imposed by law for conviction of an offense, except that upon conviction of a subsequent offense, the fact that the defendant had previously received probation shall be admissible before the court or jury to be considered on the issue of penalty.

Sec. 3e. (a) For the purposes of this section, the jurisdiction of the courts in this state in which a sentence

requiring confinement in the Texas Department of Corrections is imposed for conviction of a felony shall continue for 120 days from the date the execution of the sentence actually begins. After the expiration of 60 days but prior to the expiration of 120 days from the date the execution of the sentence actually begins, the judge of the court that imposed such sentence may, on his own motion or on written motion of the defendant, suspend further execution of the sentence imposed and place the defendant on probation under the terms and conditions of this article, if such sentence is otherwise eligible for probation under this article and prior to the execution of such sentence, the defendant had never been incarcerated in a penitentiary serving a sentence for a felony and in the opinion of the judge the defendant would not benefit from further incarceration in a penitentiary. Probation may be granted under this section only if the offense for which the defendant was sentenced was an offense other than criminal homicide, rape, or robbery.

(b) When the defendant files a written motion requesting suspension by the court of further execution of the sentence and placement on probation, or when requested to do so by the judge, the clerk of the court shall request a copy of the defendant's record while incarcerated from the Texas Department of Corrections. Upon receipt of such request, the Texas Department of Corrections shall forward to the court, as soon as possible, a full and complete copy of the defendant's record while incarcerated.

Sec. 3f. (a) The provisions of Sections 3 and 3c of this Article do not apply:

(1) to a defendant adjudged guilty of an offense defined by the following sections of the Penal Code:

(A) Section 19.03 (Capital murder);

(B) Section 20.04 (Aggravated kidnapping);

(C) Section 21.03 (Aggravated rape);

(D) Section 21.05 (Aggravated sexual abuse);

(E) Section 29.03 (Aggravated robbery); or

(2) to a defendant when it is shown that the defendant used or exhibited a deadly weapon as defined in Section 1.07(a)(11), Penal Code, during the commission of a felony offense or during immediate flight therefrom. Upon affirmative finding that the defendant used or exhibited a deadly weapon during the commission of an offense or during immediate flight therefrom, the trial court shall enter the finding in the judgment of the court. Upon a affirmative finding that the deadly weapon the defendant used or exhibited was a firearm, the court shall enter that finding in its judgment.

(b) If there is an affirmative finding that the defendant convicted of a felony of the second degree or higher used or exhibited a firearm during the commission or flight from commission of the offense and the defendant is granted probation, the court may order the defendant confined in the Texas Department of Corrections for not less than 60 and not more than 120 days. At any time after the defendant has served 60 days in the custody of the Department of Corrections, the sentencing judge, on his own motion or on motion of the defendant, may order the defendant released to probation. The Department of Corrections shall release the defendant to probation after he has served 120 days.

Sec. 4. When directed by the court, a probation officer shall fully investigate and report to the court in writing the circumstances of the offense, criminal record, social history and present condition of the defendant. Whenever practicable, such investigation shall include a physical and mental examination of the defendant. Defendant, if not represented by counsel, counsel for defendant and counsel for the state shall be

afforded an opportunity to see a copy of the report upon request. If a defendant is committed to any institution the probation officer shall send a report of such investigation to the institution at the time of commitment.

Sec. 5. Only the court in which the defendant was tried may grant probation, fix or alter conditions, revoke the probation, or discharge the defendant, unless the court has transferred jurisdiction of the case to another court with the latter's consent. After a defendant has been placed on probation, jurisdiction of the case may be transferred to a court of the same rank in this State having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs. Upon transfer, the clerk of the court of original jurisdiction shall forward a transcript of such portions of the record as the transferring judge shall direct to the court accepting jurisdiction, which latter court shall thereafter proceed as if the trial and conviction had occurred in that court. Any court having geographical jurisdiction where the defendant is residing or where a violation of the conditions of probation occurs may issue a warrant for his arrest, but the determination of action to be taken after arrest shall be only by the court having jurisdiction of the case at the time the action is taken.

Sec. 6. The court having jurisdiction of the case shall determine the terms and conditions of probation and may, at any time, during the period of probation alter or modify the conditions; provided, however, that the clerk of the court shall furnish a copy of such terms and conditions to the probationer, and shall note the date of delivery of such copy on the docket. Terms and conditions of probation may include, but shall not be limited to, the conditions that the probationer shall:

a. Commit no offense against the laws of this State or of any other State or of the United States;

b. Avoid injurious or vicious habits;

c. Avoid persons or places of disreputable or harmful character;

d. Report to the probation officer as directed;

e. Permit the probation officer to visit him at his home or elsewhere;

f. Work faithfully at suitable employment as far as possible;

g. Remain within a specified place;

h. Pay his fine, if one be assessed, and all court costs whether a fine be assessed or not, in one or several sums, and make restitution or reparation in any sum that the court shall determine;

i. Support his dependents;

j. Participate in any community-based program;

j. Reimburse the county in which the prosecution was instituted for compensation paid to appointed counsel for defending him in the case, if counsel was appointed.

k. Remain under cutodial supervision in a community-based facility, obey all rules and regulations of such facility, and pay a percentage of his income to the facility for room and board;

l. Pay a percentage of his income to his dependents for their support while under custodial suspension in a community-based facility; and

m. Pay a percentage of his income to the victim of the offense, if any, to compensate the victim for any property damage or medical expenses sustained by the victim as a direct result of the commission of the offense.

Sec. 6a. (a) A court granting probation may fix a

fee not exceeding $15 per month to be paid to the court by the probationer during the probationary period. The court may make payment of the fee a condition of granting or continuing the probation.

(b) The court shall distribute the fees received under Subsection (a) of this section to the county or counties in which the court has jurisdiction for use in administering the probation laws. In instances where a district court has jurisdiction in two or more counties, the court shall distribute the fees received to the counties in proportion to population as prescribed by Paragraph 7, Section 10 of this Article.

Sec. 6b. (a) When the court having jurisdiction of the case grants probation to the defendant, in addition to the conditions imposed under Section 6 of this article, the court may require as a condition of probation that the defendant submit to a period of detention in a penal institution to serve a term of imprisonment not to exceed 30 days or one-third of the sentence whichever is lesser.

(b) The imprisonment imposed shall be treated as a condition of probation, and in the event of a sentence of imprisonment upon the revocation of probation, the term of imprisonment served hereunder shall be credited toward service of such subsequent imprisonment.

Sec. 7. At any time, after the defendant has satisfactorily completed one-third of the original probationary period or two years of probation, whichever is the lesser, the period of probation may be reduced or terminated by the court. Upon the satisfactory fulfillment of the conditions of probation, and the expiration of the period of probation, the court, by order duly entered, shall amend or modify the original sentence imposed, if necessary, to conform to the probation period and shall discharge the defendant. In case the defendant has been convicted or has entered a plea of guilty or a plea of nolo contendere, and the court

has discharged the defendant hereunder, such court may set aside the verdict or permit the defendant to withdraw his plea, and shall dismiss the accusation, complaint, information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted or to which he has pleaded guilty, except that proof of his said conviction or plea of guilty shall be made known to the court should the defendant again be convicted of any criminal offense.

Sec. 8. (a) At any time during the period of probation the court may issue a warrant for violation of any of the conditions of the probation and cause the defendant to be arrested. Any probation officer, police officer or other office with power of arrest may arrest such defendant without a warrant upon the order of the judge of such court to be noted on the docket of the court. A probationer so arrested may be detained in the county jail or other appropriate place of detention until he can be taken before the court. Such officer shall forthwith report such arrest and detention to such court. If the defendant has not been released on bail, on motion by the defendant the court shall cause the defendant to be brought before it for a hearing within 20 days of filing of said motion, and after a hearing without a jury, may either continue, modify, or revoke the probation. The court may continue the hearing for good cause shown by either the defendant or the state. If probation is revoked, the court may proceed to dispose of the case as if there had been no probation, or if it determines that the best interests of society and the probationer would be served by a shorter term of imprisonment, reduce the term of imprisonment originally assessed to any term of imprisonment not less than the minimum prescribed for the offense of which the probationer was convicted.

(b) Any probationer who removes himself from the State of Texas without permission of the court having

jurisdiction of the case, shall be deemed and considered a fugitive from justice and shall be subject to extradition as now provided by law. No part of the time that the defendant is on probation shall be considered as any part of the time that he shall be sentenced to serve. The right of the probationer to appeal to the Court of Criminal Appeals for a review of the trial and conviction, as provided by law, shall be accorded the probationer at the time he is placed on probation. When he is notified that his probation is revoked for violation of the conditions of probation and he is called on to serve a sentence in a jail or in an institution operated by the Department of Corrections, he may appeal the revocation.

(c) In a probation revocation hearing at which it is alleged only that the probationer violated the conditions of probation by failing to pay probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

(c) In a probation revocation hearing at which it is alleged that the probationer violated the conditions of probation by failing to pay compensation paid to appointed counsel, probation fees, court costs, restitution, or reparations, the inability of the probationer to pay as ordered by the court is an affirmative defense to revocation, which the probationer must prove by a preponderance of evidence.

Sec. 9. If, for good and sufficient reasons, probationers desire to change their residence within the State, such transfer may be effected by application to their supervising probation officer, which transfer shall be subject to the court's consent and subject to such regulations as the court may require in the absence of a probation officer in the locality to which the probationer is transferred.

Sec. 10. (a) For the purpose of providing adequate probation services, the district judge or district judges having original jurisdiction of criminal actions in each judicial district in this state shall establish a probation office and employ, in accordance with standards set by the commission, district personnel as may be necessary to conduct presentence investigations, supervise and rehabilitate probationers, and enforce the terms and conditions of misdemeanor and felony probation. If two or more judicial districts serve a county, or a district has more than one county, one district probation department shall serve all courts and counties in the districts.

(b) Where more than one probation officer is required, the judge or judges shall appoint a chief adult probation officer or director, who, with their approval, shall appoint a sufficient number of assistants and other employees to carry on the professional, clerical, and other work of the court.

(c) To be eligible for appointment as an adult probation officer, a person who is not an adult probation officer on the effective date of this Act:

(1) must have acquired a bachelor's degree conferred by a college or university accredited by an accrediting organization recognized by the Coordinating Board, Texas College and University System; and

(A) one year of graduate study in criminology, corrections, counseling, law, social work, psychlogy, sociology, or a related field that has been approved by the Texas Adult Probation Commission; or

(B) one year of experience in full-time case work, counseling, or community or group work in a social, community, corrections, or juvenile agency that deals with offenders or disadvantaged persons that has been approved by the Texas Adult Probation Commission; and

(2) must not be otherwise disqualified by Section 31 of this article.

(d) The same person serving as a probation officer for juveniles may not be required to serve as a probation officer for adults and vice versa.

(e) Probation officers shall be furnished transportation or, alternatively, shall be entitled to an automobile allowance for use of personal automobile on official business.

(f) Personnel of the respective district probation departments shall not be deemed state employees and the responsible judge or judges of a district probation department shall negotiate a contract with the most populous county within the judicial district for all district probation department staff to participate in that county's group insurance program; retirement plan; and personnel policies with regard to vacation credit, sick leave credit, holiday schedule, credit union, jury leave, military leave, etc. It shall be the responsibility of the county or counties comprising the judicial district or geographical area served by such district probation department to provide physical facilities, equipment, and utilities for an effective and professional adult probation and adult community-based correctional service.

(g) Where a judicial district has criminal jurisdiction in two or more counties, those counties may enter into agreement that the total expenses of such facilities, equipment, and utilities to be distributed approximately in the same proportion as the population in each county bears to the total population of all those counties, according to the last preceding or any future federal census.

(h) The salaries of personnel, and other expenses essential to the adequate supervision of probationers, shall be paid from the funds of the judicial district. In all

the instances of employment of probation officers, the responsible judges are authorized to accept state-aid, grants or gifts from other political subdivisions of the state or associations and foundations, for the sole purpose of financing adequate and effective probationary programs and community-based correctional facilities other than jails or prisons in the various parts of the district. For the purposes of this Act, the municipalities of this state are specifically authorized to grant and allocate such sums of money as their respective governing bodies may approve to their appropriate county governments for the support and maintenance of effective programs. All grants, gifts, and allocations of the character and purpose described in this section shall be handled and accounted for separately from other public funds of the county.

Sec. 11. For the purpose of determining when fees are to be paid to any officer or officers, the placing of the defendant on probation shall be considered a final disposition of the case, without the necessity of waiting for the termination of the period of probation or suspension of sentence.

Sec. 11a. The provisions of Sections 6a, 10, and 11 of this Article also apply to Article 42.13.

SUPPLEMENT B

Incidence of Felony Probation and Revocation in Texas, 1975 - 1979

INCIDENCE OF FELONY PROBATION AND REVOCATION IN TEXAS, 1975 - 1979

Totals	1975	1976	1977	1978	1979
Felony Convictions	43,762	42,524	44,303	49,702	52,412
Probations Granted	23,733	22,754	24,210	28,316	33,252
Revocations Filed	7,613	8,778	8,564	9,795	11,494
Revocations Granted	3,495	3,781	3,943	4,532	5,175

SUPPLEMENT C

Cross-Jurisdictional Comparison of Probation Revocation Procedures

State	Judicial Revocation Procedure?	Arrest solely upon warrant (or equivalent prior judicial determination of probable cause prior to arrest)	Flexibility in sentencing at revocation hearing?	Preliminary hearing invariably required, absent waiver, to determine probable cause?
Alabama	Yes	No	No	No
Alaska	Yes	No	Yes	
Arizona	Yes	Yes	Yes	Yes
Arkansas	Yes	No	Yes	No
California	Yes	No	Yes	No
Colorado	Yes	No	Yes	
Connecticut	Yes	No	Yes	
Delaware	Yes	No	Yes	
Florida	Yes	No	Yes	No
Georgia	Yes	No	Yes	
Hawaii	Yes	No	Yes	
Idaho	Yes	No	Yes	
Illinois	Yes	Yes	Yes	No
Indiana	Yes	Yes	No	No
Iowa	Yes	Yes	Yes	No
Kansas	Yes	No	Yes	
Kentucky	Yes	Yes	Yes	No
Louisiana	Yes	No	No	Yes
Maine	No	No	Yes	Yes
Maryland	Yes		Yes	
Massachusetts		No	Yes	
Michigan	Yes	Yes	Yes	No
Minnesota	Yes	Yes	No	Probably
Mississippi		No	Yes	No
Missouri	Yes	No	Yes	No
Montana	Yes	No	Yes	

Per Se Right to Counsel?	Protection from improper search and seizure?	Statutory right to revocation hearing within specific time?	Protection from coerced confession?	Discretionary or mandatory right to bail?
No		No		Yes
Yes		No		
Yes		No		
Yes		Yes	Yes	
Yes	No	No		
	No	Yes		Yes
Yes		No		Yes
		No		Yes
No	No	No	No	Yes
No	No	No	No	Yes
Yes				Yes
Yes	No	Yes	No	Yes
Yes				Yes
Yes				Yes
Yes		No		Yes
Yes		No		
Yes		No	No	Yes
Yes				Yes
		Yes		
Yes		Yes	No	
Yes				
		No		
No		No		Yes
		No		

State	Judicial Revocation Procedure?	Arrest solely upon warrant (or equivalent prior judicial determination of probable cause prior to arrest)	Flexibility in sentencing at revocation hearing?	Preliminary hearing invariably required, absent waiver, to determine probable cause?
Nebraska	No		Yes	Yes
Nevada	Yes	No	No	Yes
New Hampshire	Yes	No	Yes	
New Jersey	Yes	No	Yes	
New Mexico	Yes	No	Yes	
New York	Yes	No	Yes	Yes
North Carolina	Yes	No	Yes	Probably
North Dakota	Yes	No	No	No
Ohio	Yes	No	Yes	Probably
Oklahoma	Yes	No	Yes	
Oregon	Yes	No	Yes	
Pennsylvania	Yes	No	Yes	Yes
Rhode Island	Yes	No	Yes	No
South Carolina	Yes	No	No	
South Dakota	Yes	No		
Tennessee	Yes	No	No	
Texas	Yes	Yes	Yes	No
Utah	Yes		Yes	No
Vermont	Yes	No	No	
Virginia	Yes	Yes	Yes	No
Washington	Yes	No	No	Yes
West Virginia	Yes	No	Yes	Yes
Wisconsin	No	No		
Wyoming	Probably	No	No	

Per se Right to Counsel?	Protection from improper search and seizure?	Statutory right to revocation hearing within specific time?	Protection fromcoerced confession?	Discretionary or mandatory right to bail?
Yes		No		
Yes		Yes		
Yes	No			Yes
				Yes
Yes	No	No	No	Yes
Yes				Yes
Yes				
Yes				Yes
		Yes		Yes
Yes				
		No		
	No			Yes
				Yes
			No	Yes
Yes		No		
Yes	Yes	Yes	Yes	Yes
Yes	Probably Not	Yes		Yes
Yes				
Yes				
Probably		No		
Yes				
No				
Yes		No		Yes